(35,839)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 80 8

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, PETITIONER,

vs.

EUGENE BOLLE

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, SECOND DISTRICT

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Sam [illegible]	[illegible]	[illegible]
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H. D. [illegible]	[illegible]	[illegible]
Eugene Bolle	[illegible]	[illegible]

Judd & Detweiler (Inc.), Printers, Washington, D. C., [illegible]

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IN THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

EUGENE BOLLE, Plaintiff-Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant-Appellant.

Abstract of Record from the Circuit Court of Lake County.

DECLARATION

Now comes the plaintiff, Eugene Bolle, by Joseph D. Ryan and Philip Rosenthal, his attorneys, and complains of Chicago & Northwestern Railway Company, a corporation, of a plea of trespass on the case.

[Fol. 2]

First Count

For that whereas on, to wit, December 4, A. D. [illegible], the defendant was in possession and control of and operating as common carriers by railroad, various lines of steam railroad in and between divers cities, towns and points in the State of Illinois and divers other cities and points in the United States, outside of and beyond the State of Illinois, and as such common carriers by railroad, the defendant was, on to wit, the day and date aforesaid, engaged in interstate commerce; that on, to wit, the day and date aforesaid, the plaintiff was employed by and was at work for the defendant as a fireman in said interstate commerce; that at the time of the occurrence of the grievances hereinafter complained of, the plaintiff was, in the due course of his employment, standing and riding upon the tender of a certain locomotive engine at, to wit, [illegible], in the County of Lake, and State of Illinois; that said locomotive engine on which plaintiff was riding as aforesaid was, then and there, coupled to three other locomotive engines, one or more of which said engines were then and there, used and defendant engaged in interstate commerce; that said engines, including the one on which plaintiff he was acting as aforesaid, had been, at the direction of [illegible] from the City of [illegible], county and State aforesaid, to [illegible] aforesaid, where said engines were to be supplied with coal and water for the purposes as [illegible] aforesaid.

And plaintiff further avers that on, to wit, the day and date aforesaid, and at the time of the accident hereinafter described, he had been in the employ of the defendant as [illegible] aforesaid, for but a short space of time, to wit, three weeks and was, then and there, inexperienced and unfamiliar with the methods adopted by the defendant, in supplying the said engines with coal and water as aforesaid, and the plaintiff was also, then and there, inexperienced and unfamiliar with the manner in which said engines were moved or switched about in performing the said work aforesaid; that he had never been engaged in such work previously and had not received from the defendant or any of its employees or agents any instructions or warning concerning the methods used in performing the said work, nor did he receive any warning of the dangers or hazards connected therewith.

And plaintiff avers that it, then and there, became and was the duty of the defendant to exercise ordinary and reasonable care for the safety of the plaintiff and to adopt and enforce reasonable rules and regulations for the guidance of the plaintiff and certain of its other employees engaged in said work aforesaid, so that the work which plaintiff was assigned to on the day and date aforesaid, could be performed with reasonable safety and under circumstances wherein the plaintiff would not be exposed to unusual or extraordinary dangers or hazards; that it, then and there, became and was the duty of the defendant to instruct the plaintiff as to his duties and as to the work he was required and expected to perform in the course of his employment and in connection with the coaling of the said engines aforesaid, and it, then and there, became and was the duty of the defendant, in view of the plaintiff's inexperience, to warn him of the dangers and perils incident to his work and to instruct him how to avoid them.

And plaintiff further avers that prior to the committing [illegible] of the grievances hereinafter complained of and on, to wit, November 22, A. D. 1922, he was employed by and began work for the defendant as a [illegible] stationary boiler in the City of Waukegan; that the said boiler was used in furnishing heat to the passenger depot and to certain other of the [illegible] the said City of Waukegan aforesaid; that on the day and date aforesaid, said boiler became and was out of repair and unserviceable and a certain other servant of the defendant, in the due course of his employment and within the scope of his authority, then and there directed and ordered the plaintiff to fire and keep heated the said locomotive engine aforesaid, and to accompany the same to Beach aforesaid where it could be supplied with coal and water for use in heating the defendant's buildings in Waukegan as aforesaid; that said engine was, then and there, coupled to the other three engines aforesaid, which said three engines were, then and there, in charge of certain other employees of the defendant, who were experienced and familiar with the work aforesaid; that said engines were, then and there, coupled together as aforesaid, and driven and propelled from Waukegan aforesaid to Beach aforesaid, by an engineer who was also a servant of the said defendant and who operated the most northerly of said four engines in so propelling them from Waukegan aforesaid to Beach aforesaid; that the said three engines aforesaid were directed as aforesaid, by the duly authorized agent of the defendant, as aforesaid, to proceed to Beach aforesaid, for the purpose of taking on coal and water so that one or more of them would be ready for use in interstate commerce when so supplied; that the plaintiff, pursuant [fol. 6] to said orders and directions did, then and there, accompany and ride upon the said engine from the said Waukegan to the said Beach as aforesaid, a distance of to wit, four miles and did, then and there, fire and keep heated the said engine while en route, as directed.

And plaintiff further alleges that after the arrival of said engines in Beach as aforesaid, and while they were standing alongside of and opposite to a certain coal chute and were being supplied with coal as aforesaid, from the said chute aforesaid, the plaintiff, in the due course of his employment, then and there, got upon the tender of the said engine which he was riding as aforesaid and adjusted the coal chute or slide for the purpose of filling the tender [illegible] with coals, then, when said coal chute or [illegible] and placed in a position to carry the [illegible] the said tender as aforesaid, [illegible] where the said tender and locomotive [illegible] the coal had been emptied from the [illegible] into the said tender aforesaid.

And plaintiff further avers that while he was standing on said tender as aforesaid and in close proximity to said chute aforesaid, and while the contents of the said coal chute were being emptied into the said tender as aforesaid, and before the process of emptying the coal chute into the said tender aforesaid had been completed, he, the plaintiff, was in an obviously dangerous and exposed position in the event that the said train of engines should be started or moved, all of which facts were known, or could have been known to the other employees of the defendant in charge of and engaged in the performance of the said work aforesaid [illegible] said, and they exercised ordinary and reasonable care in the premises and for the safety of the plaintiff; that the said other servants of the defendant in charge of the three other engines aforesaid, comprising the said train of engines aforesaid, and particularly the employees in charge of a certain other locomotive engine in said train, then and there, not regarding their duty in the premises, carelessly, negligently, wrongfully and improperly and without notice or warning to the plaintiff, started and moved the said train of engines and then and there, started and moved the same with a sudden and violent jerk and the plaintiff was, then and there, by reason of the negligence of the defendant and its employees as aforesaid, caught and crushed between the said coal chute or slide and certain portions of the said engine and tender aforesaid, and [illegible] then and there, sustained divers injuries [illegible] and internally and divers bones of [illegible] were broken, crushed and mashed so [illegible] were thereafter necessarily amputated, [illegible] and in consequence of the injuries [illegible] as aforesaid, he, plaintiff, [illegible] of his head, body and limbs were [illegible], crushed, disfigured, broken and [illegible] out, bruised and wounded [illegible] head, limbs and body and he sustained [illegible] to divers of his internal organs and a [illegible] injury to his [illegible] tion and mental condition [illegible] sequence of the premises [illegible] will continue permanently [illegible] because and a permanent [illegible] lame and disordered and [illegible] or something [illegible] and he was, by reason of the said injuries [illegible] will be hindered and prevented from following his usual occupation and he was thereby and will [illegible] permanently to be deprived of large earnings and of great gains and profits which he might and otherwise would have made and acquired, and he was compelled to and did [illegible], expend and lay out for hospital service, medical and surgical treatment, attention, nursing, medicines and supplies divers large sums of money, in and about endeavoring to be cured of his said injuries, ailments and disorders occasioned as aforesaid.

To the damage of the plaintiff in the sum of Fifty Thousand Dollars ($50,000) and therefore he brings this suit, etc.

Second Count

(Including paragraphs one, two, three, four and five of the First Count.)

For that whereas also, Plaintiff hereby adopts the first, second, third, fourth and fifth paragraphs of the first count as the same paragraphs of this count and then proceeds as follows:

And plaintiff further alleges that while he was standing on said tender as aforesaid and in close proximity to said chute aforesaid, and while the contents of the said coal chute was being emptied into the said tender as aforesaid, and before the process of emptying the coal chute into the said tender aforesaid had been completed, he, the plaintiff, was in an obviously dangerous and exposed position in the event that the said train of engines should be started or moved, all of which facts were known, or could have been known to the other employees of the defendant in charge (No. 6) of and engaged in the performance of the said work aforesaid, and they exercised ordinary and reasonable care in the premises and for the safety of the plaintiff; that the said other servants of the defendant in charge of the three other engines aforesaid, comprising the said train of engines aforesaid, and particularly the employees in charge of a certain other locomotive engine in said train, then and there, not regarding their duty in the premises, carelessly, negligently, wrongfully and improperly and without notice or warning to the plaintiff and without ringing any bell on said engine, contrary to the rules of the said defendant, which provided that an engine bell must be rung before an engine is started or moved, started and moved the said train and, then and there, moved the same with an unnecessary and violent jerk and the plaintiff was, then and there, by reason of the premises and the negligence of its employees as aforesaid, caught and crushed between the said coal chute or slide and divers portions of the said engine and tender aforesaid, and he thereby, then and there, sustained divers injuries, both externally and internally and divers bones of his body and limbs were broken, crushed and maimed so that one of his legs was thereafter necessarily amputated, and as a direct result and in consequence of the negligence of the defendant, as aforesaid, he thereby, then and there, sustained injuries and damages as alleged in the first count of this declaration and which said injuries and damages as as alleged in the first count of said declaration are expressly made a part hereof.

To the damage of the plaintiff in the sum of Fifty [fol. 9] Thousand Dollars ($50,000) and therefore he brings this suit, etc.

Third Count

(Including paragraphs one, two, three and four of the first count.)

For that whereas also: Plaintiff hereby adopts the first second, third and fourth paragraphs of the first count as the same paragraphs of this count and then proceeds as follows:

And plaintiff further alleges that after the arrival of said engines in Beach as aforesaid, he, the plaintiff, was again directed by certain other employees of the defendant to get upon the tender of the said engine and adjust the water spout used in supplying said engine with water, that he, then and there, pursuant to said directions, and in the course of his employment, got upon the tender of said engine and supplied the said engine with water as aforesaid; that thereafter the said train of engines was moved alongside of certain coal chutes and certain of the said engines were, then and there, being coaled; that when the said engine upon which the plaintiff was riding was brought to a stop shortly before the happening of the accident hereinafter complained of, the tender of the said engine on which he was riding was directly opposite to one of the aforesaid coal chutes and while said train of engines was so stopped as aforesaid, the plaintiff, then and there, adjusted the coal chute or slide, for the purpose of filling the tender of the said engine with coal.

And plaintiff further alleges that he was, then and there, in the course of his employment lawfully and rightfully upon the tender of said engine and he, then and there, [fol. 10] because of his inexperience and because of the negligent failure of the defendant to instruct him as to his duties and on account of and because of the negligent failure of the defendant to inform him of the work which he was required and expected to perform, believed and understood that it was his duty to so adjust the said coal chute as aforesaid and to fill the tender of the said engine with coal as aforesaid, notwithstanding that he later learned that under the prevailing custom of the defendant, of which he had no knowledge, such work was customarily performed by someone other than an employee or servant of the said defendant; that when said coal chute or slide was so adjusted as aforesaid, it necessarily extended and protruded over and above the said tender and so remained until all of the coal had been emptied from the said coal chute into the said tender aforesaid; that the operation of filling locomotive engines with coal aforesaid, at the place aforesaid, was well known to the other servants of the said defendant in charge of the said engines and the said work aforesaid; that the plaintiff, then and there, did not know and had no reason to believe that said engines would be started or moved before the work of filling the said tender was completed and the said chute or slide readjusted.

And plaintiff further alleges that the defendant could, then and there, and prior thereto, in the exercise of ordinary and reasonable care, have promulgated, adopted and enforced reasonable and practicable rules and regulations for the guidance of the plaintiff and its said other employees as aforesaid, which would have apprised and informed the plaintiff that he was not required, in the course of his em- [fol. 11] ployment and duty, to fill the said engine with coal as aforesaid, and which said rules and regulations, had they been adopted and enforced, would have prevented the starting of said train of engines, as aforesaid, while any of the defendant's employees were in a position to be injured by the starting of same and which said rules and regulations, had they been adopted and enforced, would have prevented the starting of said engines without warning or notice to the plaintiff while he was in a dangerous and exposed position.

And plaintiff further alleges that while he was standing on the said tender aforesaid, and engaged in the said work aforesaid, and in close proximity to said chute aforesaid, and while the filling of said tender with coal as aforesaid, was in progress, the plaintiff was, then and there, in an obviously dangerous and exposed position in the event that the said train of engines should be started or moved, all of which facts were known or could have been known to the said other employees of the defendant as aforesaid, in charge of the said other engines aforesaid, by the exercise of ordinary care on their part for the safety of the plaintiff; that the said other employees of the defendant in charge of the other engines comprising the said train aforesaid, and particularly the employees in charge of a certain other locomotive in said train, then and there, not regarding their duty in the premises, carelessly, negligently, wrongfully and improperly, without notice or warning to the plaintiff and without ringing a bell on said operating engine, started and moved the said train of engines and started and moved the same with a jerk and with unnecessary and unusual violence and the plaintiff was, by reason of the premises and the various negligent acts of the defendant hereinbefore [fol. 12] alleged, then and there, caught and crushed between the said coal chute or slide and divers portions of the said engine and tender aforesaid, and he thereby, then and there, sustained divers injuries, both externally and internally and divers bones of his body and limbs were broken, crushed and mangled so that one of his legs was thereafter necessarily amputated, and as a direct result and in consequence of the negligence of the defendant, as aforesaid, he thereby, then and there, sustained injuries and damages as alleged in the first count of this declaration, and which said injuries and damages as so alleged in the first count of said declaration are expressly made a part hereof.

To the damage of the plaintiff in the sum of fifty thousand dollars ($50,000) and therefore he brings this suit, etc.

Ryan & Rosenthal, Attorneys for Plaintiff.

ADDITIONAL COUNT TO DECLARATION

Now comes the plaintiff, Eugene Bolle, by Joseph D. Ryan and Philip Rosenthal, his attorneys, and by leave of court first had and obtained, files this, his additional count, to his declaration heretofore filed in said cause, and complains of the Chicago and North Western Railway Company, a corporation, of a plea of trespass on the case.

[fol. 18] For that whereas on, to wit, December 4, A. D. 1926, the defendant was in possession and control of and operating as common carriers by railroad, various lines of steam railroad in and between divers cities, towns and points in the United States, outside of and beyond the State of Illinois, and as such common carriers by railroad, the defendant was, on to wit, the day and date aforesaid, engaged in interstate commerce; that on, to wit, the day and date aforesaid, the plaintiff was employed by and was at work for the defendant as a fireman in said interstate commerce; that at the time of the committing of the grievances hereinafter complained of, the plaintiff was, in the due course of his employment, standing and riding upon the tender of a certain locomotive engine at, to wit, Beach, in the County of Lake, and State of Illinois; that said locomotive engine on which plaintiff was riding as aforesaid was, then and there, coupled to three other locomotive engines, one or more of which said engines were, then and there, used and definitely assigned to interstate commerce; that said engines, including the one on which plaintiff was riding as aforesaid, had been, at the direction of the defendant, operated from the City of Waukegan, county and state aforesaid, to Beach aforesaid, where said engines were to be supplied with coal for the purposes and uses aforesaid.

And plaintiff further avers that on, to wit, the day and date [illegible], and at the time of the accident hereinafter described, he had been in the employ of the defendant as aforesaid but a short space of time, to wit, three weeks and was then and there inexperienced and unfamiliar with [illegible] the methods adopted by the defendant, in supplying the said engines with coal as aforesaid, and the plaintiff was also, then and there, inexperienced and unfamiliar with the manner in which said engines were moved or switched about in performing the said work aforesaid; that he had never been engaged in such work previously and had not received from the defendant by any of its employees or agents any instructions or warning concerning the methods used in performing the said work, nor did he receive any warning of the dangers or hazards connected therewith.

And plaintiff avers that it, then and there, became and was the duty of the defendant to exercise ordinary and reasonable care for the safety of the plaintiff and to adopt and enforce reasonable rules and regulations for the guidance of the plaintiff and certain of its other employees engaged in said work aforesaid, so that the work which plaintiff was engaged in on the day and date aforesaid, could be performed with reasonable safety and under circumstances wherein the plaintiff would not be exposed to unusual or extraordinary dangers or hazards; that it, then and there, became and was the duty of the defendant to instruct the plaintiff as to his duties and as to the work he was required and expected to perform in the course of his employment and in connection with the coaling of the said locomotive engine aforesaid, and to supervise and direct the coaling of said engines at Beech aforesaid, and it, then and there, became and was the duty of the defendant, in view of the plaintiff's inexperience, to warn him of the dangers and perils incident to his work and to instruct him how to avoid them.

And plaintiff further avers that prior to the committing [illegible] of the grievances hereinafter complained of and [illegible] A. D. [illegible], he was employed by and [illegible] for the defendant as a fireman on a stationary [illegible] aforesaid, which said boiler [illegible] defendant's passenger depot [illegible] and to furnish heat [illegible] steam pipes which were then and there, being used and maintained by the defendant for the purpose of heating [illegible] [illegible], then and there, used and operated by the defendant in its [illegible] [illegible] station and to heat a certain [illegible] of which was, then and there, being used by the defendant in interstate commerce and which said steam or yard plant were also used for the purpose of supplying steam at certain of its yard switches, then and there, located in its yard and premises in the City of Waukegan, county and state aforesaid; that on the day and date aforesaid, said boiler became and was out of repair and unserviceable and the said locomotive engine aforesaid was, then and there, being used, maintained and operated by the defendant aforesaid in the place of the said stationary boiler aforesaid, for the purposes and uses aforesaid; that a certain other servant of the defendant, acting in the due course of his employment, and within the scope of his authority, then and there, directed and ordered the plaintiff to accompany the said locomotive engine aforesaid to Beach aforesaid, and to fire and keep heated the said engine en route to Beach as aforesaid, and the said other servant of the defendant, then and there, ordered and directed the plaintiff to ride the said engine, after it was coupled to the said other engines aforesaid, to the said [fol. 16] Beach aforesaid, and to supply the said engine, at Beach, with coal so that it would be in readiness, for the purposes and uses aforesaid, upon its return to the said City of Waukegan, county and state aforesaid; that said engine was, then and there, coupled to the other three engines aforesaid, which said three engines were, then and there, in charge of certain other employees of the defendant, who were experienced and familiar with the work aforesaid; that said engines were, then and there, coupled together as aforesaid, and driven and propelled from Waukegan aforesaid to Beach aforesaid, by an engineer who was also a servant of the said defendant and who operated the most northerly of said four engines in so propelling them from Waukegan aforesaid to Beach aforesaid; that the said three engines aforesaid were directed as aforesaid, by the duly authorized agent of the defendant, as aforesaid, to proceed to Beach aforesaid, for the purpose of [illegible] and being supplied with coal so that one or more of them would be ready for use in interstate commerce when so supplied; that the plaintiff, pursuant to said orders and directions did, then and there, accompany and ride upon the said engine from the said Waukegan to the said Beach as aforesaid, a distance of to wit, four miles and did, then and there, fire and keep heated the said engine while en route, as directed.

And the plaintiff further alleges that after the arrival of said engines in Beach as aforesaid, and while they were standing alongside of and opposite to certain coal chutes and were being supplied with coal as aforesaid, from the said chutes aforesaid, the plaintiff, in the due course of his employment, and pursuant to the orders and directions pre- [fol. 17] viously given to him by the duly authorized agent of the defendant at Waukegan as aforesaid, then and there, got upon the tender of the said engine which he was riding as aforesaid, and adjusted the coal chute or slide for the purpose of filling the tender of the said engine with coal; that when said coal chute or slide was adjusted and placed in a position to convey the coal from the said chute into the said tender as aforesaid, it extended over and above the said tender and necessarily so remained until all of the coal had been emptied from the said coal chute into the said tender aforesaid.

And plaintiff further alleges that while he was standing on said tender as aforesaid and in close proximity to said chute aforesaid, and while the contents of the said coal chute was being emptied into the said tender as aforesaid, and before the process of emptying the coal chute into the said tender aforesaid had been completed, he, the plaintiff, was in an obviously dangerous and exposed position in the event that the said train of engines should be started or moved, all of which facts were known, or could have been known to the other employees of the defendant in charge of and engaged in the performance of the said work aforesaid, had they exercised ordinary and reasonable care in the premises and for the safety of the plaintiff; that the defendant, then and there, not regarding its duty in the premises, carelessly, negligently, wrongfully and improperly and without notice or warning to the plaintiff, started and moved the said train of engines and, then and there, started and moved the same with a sudden jerk and the plaintiff was, then and there, by reason of the negligence of the defendant as aforesaid, caught and crushed between the said car and chute [fol. 18] or slide and divers portions of the said engine and tender aforesaid, and he thereby, then and there, sustained divers injuries, both externally and internally and divers bones of his body and limbs were broken, crushed and maimed so that one of his legs was thereafter necessarily amputated, and as a direct result and in consequence of the negligence of the defendant, as aforesaid, the ligaments, muscles, tendons and membranes of his head, limbs and body were thereby, then and there, sprained, dislocated, broken and otherwise injured; and he was cut, bruised and wounded about his head, face, limbs and body and he sustained severe and serious injuries to divers of his internal organs and a serious shock and injury to his spine, nervous system and mental faculties; and as a direct result and in consequence of the premises he has ever since suffered and will continue permanently to suffer great pain, and he has become and is permanently disfigured, crippled, sick, sore, lame and disordered and incapacitated from attending to or transacting his regular business and affairs and he was, by reason of his said injuries and permanently will be hindered and prevented from following his usual occupation and he was thereby and will continue permanently to be deprived of large earnings and of divers gains and profits which he might and otherwise would have made and acquired, and he was compelled to and did incur, expend and lay out for hospital services, surgical and medical treatment, attention, nursing, medicines and otherwise divers large sums of money, in and about endeavoring to be cured of his said injuries, sickness and disorders occasioned as aforesaid.

[fol. 19] To the damage of the plaintiff in the sum of fifty thousand dollars ($50,000) and therefore he brings this suit, etc.

Ryan & Rosenthal, Attorneys for Plaintiff.

MINUTE ENTRIES

Leave to defendant to file notice of special matters of defense.

Notice of proof of defense of contributory negligence under defendant's plea of general issue.

[illegible] that cause may be set down for trial for April [illegible], and waiving notice of filing of mandate and time [illegible].

[illegible] that mandate be filed and that case be set for trial April [illegible].

[illegible] of Appellate Court.

Notice of application to court for leave to file additional notice of special defense.

Order that defendant's original plea and notice stand as to the additional count of the declaration; and that defendant have leave to file additional notice of special defenses.

Jury called, impaneled and sworn.

Notice of proof of defense of assumption of risk under the plea of general issue.

Court proceedings; defendant moves at close of plaintiff's evidence to instruct jury to find it not guilty; motion denied; exception by defendant.

Further court proceedings; defendant moves the court at the close of all of the evidence to instruct the jury to find the defendant not guilty; motion denied; exception by defendant.

Verdict of the jury in favor of plaintiff assessing his damages at $[illegible]; jury discharged.

Written motion of defendant for new trial, stating points in support thereof.

[illegible] Motion for new trial denied; exception by defendant; motion in arrest of judgment; denied; exception by defendant.

Court enters judgment on the verdict in favor of the plaintiff and against the defendant for the sum of $37,500; exception by defendant.

Judgment in favor of the plaintiff and against the defendant for $[illegible] damages, together with costs; exception by defendant; defendant prays appeal; allowed on condition that defendant file bond in the sum of $48,500 within [illegible] days; defendant given ninety days in which to file bill of exceptions.

Appeal bond.

Stipulation that original bill of exceptions be incorporated in the record instead of a copy.

Stipulation relative to praecipe for record.

Praecipe for record.

Notice of [illegible] for approval of bill of exceptions.
Filing of bill of exceptions.
Bill of exceptions.
Trial begins.

Leave of court that plea to the declaration stand as plea to the additional count, together with notice of proof under the plea of general issue [illegible]

Discussion of admissibility of evidence [illegible] stipulation of the parties, when [illegible]

Court overrules defendant's objection to the admissibility of the evidence referred to and objected to in the stipulation.

Objection and stipulation.

(This objection, preceding in the stipulation the stipulated (fol. 21) testimony, is: The defendant objects to the introduction of any evidence on the part of the plaintiff the purpose of which is to show (1) that the three engines to which the heater engine was coupled were taken to and were at Beach at the time of the accident for the purpose of preparing them for future use in interstate commerce, (2) that these three engines, or any of them, engaged in interstate commerce after the accident, (3) the kind of commerce, if any, in which these three engines, or any of them, ordinarily engaged, (4) that these three engines had been or were to be assigned to interstate work, (5) what, if any, work was done by any of these three engines at any time after the accident involved in this case, or (6) that before the trip to Beach any of these three engines had been used in interstate commerce.)

Which objection was overruled by the court and the testimony in the stipulation admitted in evidence, over defendant's objection, and the stipulation then and thereafter in evidence; exception by defendant.

Plaintiff's counsel reads the stipulation containing the objection of defendant, to the jury, as follows:

That the three engines coupled to the heating engine on which plaintiff was riding from the [illegible] roundhouse to Beach on December [illegible], were engines then engaged, while being used in transportation, in both intrastate and interstate transportation; and that each of these three engines were making the trip from the roundhouse to the [illegible] to be [illegible] for the purpose of [illegible]

[illegible] in both such classes of transportation. That on the morning after the accident to the plaintiff herein, or December 7, 1909, one of the said three engines went on its first trip, and at the time of the accident with respect to [illegible] that engine the railway company knew and had records to show, not in Waukegan but elsewhere, that at the time that engine went up to Bench to get coal on the night of the 6th, that the next trip it would take would contain cars that had interstate commerce in them. This was engine No. 88 and was used on the run known as the North Chicago switch run. Engine number 1827 was used on the Chicago, Waukegan local way freight run. Engine number 481 was used as a Waukegan switch engine and engine No. 204 was used as the heating engine; that engine number 88 used on the North Chicago switch crew run, had been assigned before the time of the accident in question to this run and that on the morning following the accident it went out on this run and picked up two cars to be used in interstate commerce which had been assigned to interstate commerce on the afternoon before the accident and were to be taken to a manufacturing plant known as the Davis-Watkins Dairy Company; that these cars had been assigned to them after a definite order had been received by the defendant for certain length box cars and that a book in the office of the depot of the defendant in North Chicago, Illinois, contained this record; that these cars were to be used in shipping freight to Lafayette, New Jersey; that the order for the cars was received at 3:00 P. M. on December 6, which was the afternoon before the accident; that these cars were moved and put out for use in interstate commerce by the North Chicago switch crew [illegible] engine number 88 on December 7, the morning [illegible] accident; that this engine number 88 in its [illegible] in getting the cars to placing them [illegible] was in interstate commerce; that [illegible] number 481 was used in Waukegan on De- [illegible] about 5:00 o'clock P. M. and had [illegible] which it did on the 7th at the [illegible] it had been and was used [illegible] preceding the accident and [illegible] that engine number 1827 had [illegible] the accident in question, been assigned to [illegible] a Waukegan local way freight run and [illegible] been used in this run for several days before the accident in question and it was used on this run for several days after the accident in question; that two engines were in each day working on the Chicago & Waukegan local way freight run; that there were three engines assigned for work in the Waukegan yard; that on some days when the work was light only two engines worked; that all switching work both interstate and intrastate in the Waukegan yard was done by these engines; that the railroad company would have notice along the line of cars en route and destined from other cities and going to Waukegan; that the cars that were pulled by the Chicago, Waukegan local way freight engine on the morning of the [illegible] of December, the day following the accident, were set out definitely and assigned to a run before they were picked up and that this assignment was made the night before.

Not subject to the objection, ruling and exception aforesaid, it is stipulated as follows:

That at the passenger depot in Waukegan the company sells interstate passenger tickets; that the building itself, the passenger depot, accommodates from time to time interstate passengers of the defendant and through the instruments used by the defendant for that purpose in that station, that the defendant receives and transmits orders [fol. 24] involving interstate trains and cars, and receives and transmits trains and cars in the transportation of interstate freight; that there is also a freight depot, which is apart from the passenger station, and which is not heated by the heating plant in the roundhouse. No freight business is carried on at the passenger depot.

[illegible], the plaintiff, testified as a witness in his own behalf:

I live in Chicago and was [illegible] years old the [illegible] of last November. I was [illegible] years old when I went to work for the defendant, November [illegible], [illegible]. Mr. [illegible], the [illegible] roundhouse foreman, hired me and told me to take a look around the roundhouse and [illegible] where to go to work. My brother [illegible]

[illegible]

[illegible] pursuant to the direction of Mr. Plumb I [illegible] my
[illegible] went to New Jersey and [illegible]
[illegible] done. [illegible] the engine
[illegible] in the roundhouse at Washington, [illegible]
[illegible] him before that time. I never saw Mr.
[illegible] I had had no previous experience
[illegible] of any character or description. After
[illegible] to New Jersey I saw him and
[illegible] with him. He taught me to turn
[illegible] locomotive in the roundhouse, and
[illegible] I learned how to do this and did it
[illegible] engine is moved to see that there
[illegible] enough water in the boiler,
[illegible] employment
[illegible] days [illegible] five days. [illegible] plant
[illegible] there [illegible] days, during
[illegible] in addition to the other
[illegible] days. Then, on No-
[illegible] before. A loco-
[illegible] the plant the first [illegible]
[illegible] locomotive
[illegible]

the foreman of the switching crew. I told him we did not have near enough water, and he said throw it aside we got to get in the clear, and he cursed. He said "damn it, throw it aside." Then the engines were moved south onto a side track. When they started to move off the main track I was up on the tender. After they got on the side track I waited a few seconds and went down to look at my water and fire. We stayed on the side track I should judge four or five minutes, and while there a through train went through, going north on the west track; the track we took water on. After the through train went through the next movement of the engines was north, onto the same track where we took water. I got back up on the tender to finish taking water but the engines did not stop at the water tank. They went to the cross-over switch and then came south; they took the cross-over switch; they came further south; they got on the east track, then they pulled south towards the coal chute. I was then on the tender. After these engines started to pull south they stopped in front of the coal chute. A man got up on the most southerly engine and reached up and pulled down the coal chute. I just seen a man being up there and seen the coal chute come down. I did not do anything at that time. After the first engine was coaled they moved south several feet. When they stopped that time my engine was just opposite a coal chute. Tony Terasky's engine was south of me. I couldn't say from where I was whether his engine was spotted for coal, with reference to the coal chute, until the coal chute come down. When [illegible] we moved south the second time the engine Tony Terasky was on was spotted for coal. I saw what was done on that engine with respect to taking coal. I seen a man get up there and reach up and pull down the chute. At that time my tender was just opposite the coal chute alongside of where I was. I did not know who that man was that I seen on the engine next to me. I thought I knew at that time. I thought it was Tony Terasky. I seen that he reached up and pulled down the chain and the chute come down and I reached up and pulled mine down. His was down an instant and then I reached up and pulled mine down. I was standing [illegible] in the tender and they [illegible], [illegible], and I got caught between. I [illegible] any notice or warning that the movement was to be made. I was standing on the right side of the chute facing east, with the chute on my left side. With reference to the position of the cars, the track runs north and south. I was on the east side of the tender. I was standing on the footboard that goes around the tank. The cab was to my right, south of me. I was between the cab and the coal chute. As the coal was being conveyed into my tender it made considerable noise. The engine moved before I was injured several feet. What injured me was I got caught between the coal chute and the cab of the engine. I made outcry, then the engine stopped. While standing up on the tender of my engine there, before I started to put coal into it, I saw Mr. McManaman and his helper standing on the west track about at the head of my engine southward, and they were carrying lanterns. When I was standing on that tender, the place where I was standing was about a foot and a half lower than the cab of the engine. I am six feet tall. The man that I saw on the south engine when [fol. 29] it first stopped and took coal had no lantern of any kind. The other man had no lantern. I had no lantern. There were no lights there in the vicinity of the coal chute. My purpose in staying on the top of the engine after it moved toward the coal chutes was with the intention of taking water.

Q. When Terasky told you to get on your engine to go to Beach for coal and water, what did you believe at that time you had to do after you got there?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. Take coal and water.

Whereupon defendant's counsel moved the court to strike the answer; which motion the court denied.

(To which ruling defendant excepted.)

Following the accident I was taken back to Washington and to the hospital. On the way to the hospital I got [illegible] faint. After I got to the hospital they gave me ether and tried to set my leg. After I came out of the ether I was still worse, sicker. I had pain in my leg [illegible]. I suffered pain quite long after I came out of the hospital.

My leg was operated on about two weeks after the accident. At the hospital they put my leg in a box and tied a string around my ankle and over the end of the bed, where they had a two-gallon jug of water tied onto it; that was a [illegible] or extension, and every time they moved it I could feel the bone rip; it was painful. I knew that my leg was to be amputated; they told me that it would be necessary. Following the operation the stump would not heal up and I had to have it lanced between twenty-five and thirty times. After the operation was performed I stayed in the hospital about five weeks. That operation [illegible] they performed on my leg twenty-five or thirty times was they lanced it and put in a drain; it was discharging pus. At the end of seven weeks the stump had not completely healed and I had to go to the doctor's office every day. In the first operation my leg was amputated a few inches above the knee; I had about ten or ten and one-half inches of stump. After leaving the hospital I went back about three times for treatment. The first time, it was lanced and drained. For a couple of months I went to see the doctor every day, sometimes every other day. Dr. Bellows was my doctor in attendance. After a couple of months the leg did not then heal up; it would swell up about again as large as its normal size. I remained in Waukegan following my injury until about the middle of May. It was after I went to Jacksonville that my leg became swollen to twice its normal size. Here at Waukegan it did swell up at times. I went home for a month or so and then to Jacksonville. My home was at Woodstock, Illinois. How I came to go to Jacksonville was I have a brother there. Dr. A. A. King treated me there. He lanced it and reamputated it. He put in a drain for a couple of weeks before he amputated it. Then he amputated about four or four and one-half inches and left a stump of about five or five and one-half inches. After that [illegible] the stump did not completely heal; it [illegible]. I came back to Chicago and [illegible]. After the operation at Jacksonville [illegible] and [illegible] the condition several [illegible] about October of [illegible]. The [illegible] up about the first part of [illegible]. After [illegible] the stump was still sensitive. I cannot wear an artificial leg on that stump because it is too tender and [fol. 81] I [illegible] there; I have [illegible]. At the time of the accident I was earning [illegible] month. Since that accident I [illegible] Cab Company, [illegible]. They [illegible] twelve hours. I worked there about a year and [illegible] months. At the time I quit my wages were [illegible]. During my employment there I [illegible] a week and was cut to $19 a week [illegible] was transferred to Evanston. The general condition of my health since this injury has been very poor. Prior to that time I had never had any serious sickness or injury. Before the accident I weighed about [illegible] pounds. Since the accident up to the present time I have never regained my former weight. Besides the employment with the Yellow Cab Company I worked in a [illegible] store for about three weeks earning $15 a week, but I couldn't stand it; too much hopping around. When I left the Yellow Cab Company in Chicago I did not continue in its employ in Evanston; my health fell down. My job was still there at $19 a week, but I couldn't afford to move to Evanston on $19 a week and I lived on the south side. I have never had any other employment since the accident. I went to school to the seventh grade. I have never had any experience in office work or anything of that sort. Before I went to work for the defendant I was on a farm. I drove a truck in Elgin for several weeks, earning seventy-five cents an hour, working ten hours a day.

[fol. 82] *Cross-examination:*

For a couple of weeks before my accident they didn't have any day foreman at the roundhouse, but my brother was on the job right there as night foreman. He was not on the job the night the accident happened; he was home sick in bed for several days before the accident, during which time there was no foreman there at the roundhouse night or day; I don't know who was. My brother [illegible] I first went to work at the roundhouse, [illegible] orders from Tony, and do as Tony [illegible] there was anything [illegible] would do [illegible] [illegible]. By [illegible] turntable when it was required. I mean that my brother told me to do whatever I saw Tony do. When Tony turned the turntable so that the engine would be facing right, in the right stall, or so that it would come out, then of course when I would go and turn it myself. I could tell when I was supposed to do a thing if it had to be done; if it had to be done I would do it. When I was at the engine or at the stationary boiler, shoveling coal into the fire box, I could not see Tony then doing anything, so that part of the time at least Tony did his own work without me being present. While firing the engine for the stationary boiler I could tell if the turntable needed turning because they would call a man out. Suppose Tony was busy with something, like building a fire, I would have to turn the turntable. He would call for me to go and turn the turntable. He would be making his fire there and he would hear the engine. What I mean by "do as he done," if I seen Tony do anything like build a fire or watch engines and turn turntables, if that work (that is) was required to be done and Tony was busy way I would do it. Suppose an engine would pull out of the roundhouse somebody would have to turn the turntable. After the stationary boiler was started, when Tony would go to Beach for coal and water, he would tell me to take care of the turntable and fires. Before the accident he would tell me he was going to Beach to get coal and water, and it was during the times that Tony went to Beach to get coal and water that I done the things that I saw Tony do. I meant by my language, that my brother told me to take orders from Tony and do as he done, that when Tony went to Beach for coal and water I was to do, in his absence, what I had seen him do while he was there. Tony would ask me to do it while he was at Beach. I took Tony's place while he was at Beach. While I was doing Tony's work nobody fired my engine. That was a job that did not require my constant attention. After the first five days it was only when Tony was away at Beach that I did the things that he did while he was there. I built fires, turned turntables, watched engines and fired the heating boiler while Tony was there at the roundhouse; doing his part of the work too. I learned to fire the stationary boiler by watching Tony do it. He fired it at times. Tony and I [illegible], that is, part of the time I would do his work [illegible] learned in that way how to do it. When I went to work in that roundhouse I was absolutely green as far as everything was concerned. [illegible] to everything that I learned to do down there, I was [illegible] shown how to do it, and always shown how to do it. I never did anything that I didn't know how to do without learning first how to do it; somebody else did it [illegible] and then showed me how the first time. I worked on my father's farm at Woodstock, Illinois, until I was twenty-one. After working driving a truck at Elgin about [illegible] weeks I went back home and played several days and then my brother told me he thought he could get me a job here (at Waukegan); he didn't tell me it was firing the heating plant in the roundhouse, and I didn't know what the job would be until I got here. I never had been up to Bench before this night that the accident happened. I had seen a coal chute before, similar to this one at Bench, on a railroad, before the accident. I have not seen the one at Bench since the accident. This night of my accident was the first time I ever saw it. I have never seen this coal chute but once in my life, and that was in the dark. I could tell in the dark that it was similar to the coal chute I had seen somewhere else once. The coal chute I had seen before was on the highways in some town, [illegible] one in Woodstock and another at [illegible] on the [illegible] Western road. I wouldn't say it is [illegible] like the one at Bench. It is a coal chute. [illegible] I knew it was a coal chute. [illegible] chute from the track side. There are no coal slides that [illegible] with a chute on the highway side. [illegible] I had never seen before the night of the [illegible] of how these things worked [illegible] was one of the [illegible] but I am not positive, that he was [illegible] of the roundhouse foreman. I heard him give orders to [illegible] to almost anybody. Not to my knowledge [illegible] the locomotive engineer of the [illegible] I don't [illegible] did not nor did the helpers that I know of. [illegible] was the foreman of the [illegible] over there at the yards at [illegible]. The movement of these four engines after they were coupled up together was under [illegible]'s directions and orders. [illegible] of which [illegible] was the boss was to couple these engines together and [illegible] the orders to Beach to have them coupled up there [illegible]. Everybody there on these engines [illegible] would have to do what [illegible] told him, but that was the first time I went and I did not know who was the boss, but I knew that all of the others were subject to his orders and I found out there at the water pipe that I was subject to [illegible]'s orders. I found out at that time when the water was being taken that everybody there, every employee of the North Western Railroad that was there with these four engines, was subject to [illegible]'s orders. It was dark when I took water. With reference to the station at Beach, I don't remember, and couldn't say, where that water tank is, whether north or south. I don't know where the station at Beach is. I [illegible] don't know where the coal chutes were with reference to the station at Beach, whether north or south. I think the coal chute where we took coal was a little to the north of the water tank, northeast, I don't remember how far, a few blocks. This water tank was a pipe coming out of the ground, just a stand-pipe, and on top of it it had an arm pipe that stuck out and revolved around. [illegible] told me to get on top of the tender and get water. It was [illegible] taking water. I had never done it before. [illegible] did not tell me how to do it, he just said "Get up there and take water." I had seen it taken over in the yards of Waukegan time after time. The [illegible] is to there [illegible] the Waukegan, at the [illegible] I could [illegible] see if the water was [illegible] than the [illegible] was no [illegible] there. [illegible] I was [illegible]. If [illegible] December [illegible]. I [illegible] through the [illegible] a little water and [illegible] when we left, so [illegible] mine that it was not [illegible] was in the tank. The [illegible] other was to [illegible] train coming, that [illegible] We went [illegible] a mile [illegible] After we got in the [illegible] I pushed this spout out of the way [illegible] till we was in the clear, [illegible] water, [illegible] about one hundred [illegible] feet. [illegible] there to take more water. I [illegible] water and were going somewhere else and I [illegible] on the tender, and then we did so somewhere else. Then I got down in the cab to [illegible] the water and [illegible]. I got back up on the tender after the train went through. During that time I was standing up there on the tender of my engine, right in back of the cab, on a railing on the side of the tender. I haven't seen any switch engines since that time. I seen them but have not paid attention to them. This place where they put the coal in is an empty bin extending from the top of the tender down the depth of the tender. It does not extend clear from the [illegible] to the end of the tender, it only occupies two-thirds or so of that space. At that time my tender was practically empty of coal. On this particular engine there is a place on the side where the men can stand. I am almost positive the rail extends back from the cab to the end of the coal bin on one side and the same on the other. I have seen a switch engine that looked like that. I don't think the top of the coal bin on a switch engine is just the thickness of the steel sides of the engine. The railing around the top of the coal bin [illegible] on top of the coal bin. It was [illegible] It was made out of [illegible] a little small [illegible] when a lot of water [illegible] on the corner of [illegible] tender fell off and the [illegible]

[illegible] a diagram on a piece of paper [illegible]. This diagram was [illegible] and was received in evidence [illegible] of this record.)

[illegible] I understand [illegible] the way, so you [illegible] I should say it extended [illegible]

Q. All of these operations north past the crossover, and [illegible] the crossover and spotting of the coal chutes, all [illegible] movements that occurred previous to the time that you [illegible] were made, so far as you could see, without any signals at all?

A. I wasn't paying any attention.

I did not at any time while I was up there, or while the movements were going on, pay any attention to any matter [illegible] of any kind. I didn't pay no particular attention [illegible] I could see or hear any signals given during those movements. Only one coaling operation was gone through [illegible] four engines before the time [illegible] moved and I got caught; that was when they [illegible] engine. I don't believe I testified [illegible] that I was hurt on the third [illegible] I think there was a headlight burning [illegible] on the north end of the most northerly [illegible] the most southerly engine; I couldn't [illegible] I don't know positively whether any headlights [illegible] on any of the engines. I don't think [illegible] burning on any of the engines [illegible] south end of the four. I didn't [illegible] but before the engines moved north [illegible] I was caught I don't know where Mr. Plum- [illegible] where [illegible] was, the other engineer, [illegible] the other members of the [illegible] were Mr. McManaman [illegible] were standing southwest of the front [illegible] I should judge eight or [illegible] They weren't any place where, [illegible] they might get hit. At no time [illegible] after I left the water, from [illegible] and caught me, did I [illegible] other persons around me. [illegible] spoke to me. The [illegible] blowing hard from [illegible] we went to the [illegible] track of [illegible] was on the [illegible] the west [illegible] we went on the [illegible] I got back into the cab of my engine, after I took water, after we [illegible] sidetrack. I stayed up on top of the engine [illegible] water and [illegible] we got on the sidetrack [illegible] train [illegible] up I got [illegible] and I don't imagine I could have done that if I had seen the train coming. When the engine would come from the crossover onto the coal track [illegible] the coal shed and the tender of my engine was [illegible] the slides on the coal shed [illegible] little chick back of the [illegible] being taken on the next [illegible] engine. I [illegible] couple of times to [illegible] my engine [illegible] Nanaimo and [illegible] came south through the crossover and [illegible] I saw nobody but a man [illegible] engine [illegible] nothing of a man [illegible] Tony Tornasky on the engine, on the [illegible] engine from the south, [illegible] it was Tony Tornasky, and I [illegible] I imagine there was dust [illegible] I did not see any [illegible] engine was [illegible] there wasn't any dust. [illegible] second engine from the south [illegible] any dust from the coal, it was dark. [illegible] didn't see the clouds of dust [illegible] but I imagine it would be, with the [illegible] side, the coal [illegible] over the coal chute. I [illegible] was any dust or not. [illegible] side of the engine [illegible] I pulled my [illegible] to pull down the chute [illegible] chains before. I would see dust on the other engines. I [illegible] couldn't see the chain on the chute next to my engine. I figured out because there was a chain on the chute next to me that that must be what the man on the engine next south of me was reaching for; that was the only way the chute would come down. I didn't know it; that is what I thought. I figured out he must have pulled a similar chain on the coal chute beside his engine.

Q. That looked easy to you, so you thought you would do it on yours, is that right?

A. I thought I had to do it.

Q. I suppose you could have found out from somebody before doing it by asking somebody?

A. I thought it was my duty to do it. On that chute where I was standing, between the coal chute that I pulled down and the cab of my engine, was about three or four feet. At that point I was standing nearer than the middle to the cab of the engine.

Q. So you knew as you stood there, the cab of the engine on one side and the coal chute on the other, that if the engine moved north you would be caught?

A. I didn't think they would move when I was taking coal.

Q. They had moved several times without giving any signals?

A. I didn't hear any.

Q. You did know that if they did move this time, just as they had before, and moved in a northerly direction, you would be caught, didn't you?

A. I expected a warning.

There was another man on the southerly engine taking coal and I think they moved without any warning. At the time when they moved [illegible] southerly engine there was [illegible]

Q. You thought they were not giving a signal when they were moving south to that [illegible]?

A. I was in plain view of the [illegible] and I didn't think they would move without giving a warning.

Q. In plain view of who?

A. Anybody who would look.

Q. I [illegible] you [illegible] any other members of the crew, [illegible] [illegible] [illegible] didn't. [illegible] wouldn't [illegible] [illegible] [illegible] [illegible]?

A. I was in the open [illegible] [illegible] [illegible].

Q. You couldn't see into the cab, but they could see you out of the cab, is that it?

A. Yes sir.

Q. You did know that if they moved south while you were standing in that position you would get caught?

A. It never entered my mind; I never thought they would move.

Q. You never thought of that at all?

A. No.

Q. As a matter of fact, it is perfectly plain, that if they should, you would get caught?

(To which question plaintiff's counsel objected, which objection was sustained by the court, to which ruling defendant excepted.)

Up to the time I pulled my slide down there was no [illegible]ing operation there involving two engines at the same time. On all of this whole trip, from the [illegible] [illegible] here, my engine was [illegible] being [illegible] or pulled by the other engines. I didn't [illegible] anything about [illegible]. The power wasn't [illegible] up on my engine at any time on the trip from the roundhouse up to there.

(Rec. 48) Q. It wasn't [illegible] [illegible] of engines for any such purpose?

(To which question plaintiff's counsel objected, which objection the court sustained, to which ruling defendant excepted.)

Before I got to the [illegible] [illegible] there I was [illegible] that a man had to get up on the [illegible] of an engine [illegible] [illegible]. That was something I just [illegible] [illegible] [illegible] [illegible] [illegible].

think when it came to taking coal somebody had to be up on the tender of the engine. Up to the time when they got to [illegible] [illegible] I did not know it was necessary for a man to be up on the tender of an engine to take coal; I wasn't [illegible]. I had seen coal taken before but never seen them take coal. I knew it had to get up on the tender to take coal, [illegible] they would tell a person that you would have to get on top of the tender to take coal. I don't think any coal is [illegible] from the coal chutes. At that time I didn't know anything about it. Before I got to the coal chutes I had figured out in my own mind that before you took coal a person would have to be on the tender of the engine. I was told to go out and get coal and water by Tony [illegible] in the roundhouse. I didn't attempt to get up and take water before Tony came to me there and told me to do that. [illegible] [illegible] what he told me down in the roundhouse was that I was to get up on top of the tender and take water. When we got to the water spout and I sat in the cab and waited without doing a thing until Tony came from the other engine up to my engine and told me to get up. I didn't know we were at the water spout; I didn't look for any; I didn't know why they were stopped; I didn't think they took water on any of the other engines before they took water on mine. Mr. [illegible], the roundhouse foreman, hired [illegible] me and put me to work. He did not give me a book of rules and I never had a book of rules. I was on the [illegible] [illegible] boiler department.

Q. That is what you were hired for?

(To which question plaintiff objected; which objection the court sustained; to which ruling defendant excepted.)

I got from the cab of my engine up on the tender through the place where the coal is, through the boards. I mean the boards that separate the coal in the tank from the cab of the engine and keep the coal from running into the cab. That [illegible] [illegible] the tender right into the coal bin. My coal bin was [illegible] empty at this time, practically empty. I [illegible] of the coal bin up to where I took water on the [illegible] [illegible] the [illegible]. First I went in between [illegible] [illegible] to get in the coal bin, then I climbed [illegible] [illegible] until I got to the top of the coal bin. I got [illegible] steps to the flat place on the rear of the tender where you take water, [illegible] get up. To take water [illegible] first, climb up [illegible] back into the tender [illegible] the extreme end of the [illegible] took water. To get [illegible] the tender, which [illegible] of the coal bin. To get [illegible] I would have to crawl [illegible] it is. I don't feel [illegible] water and got back to the [illegible] little shelf, got [illegible] to the cab [illegible] property. I told you about [illegible] (Tel. 27) [illegible] to the [illegible] we were on the [illegible] but I didn't go through the [illegible] and climb up to get [illegible] was no place to hold on. I [illegible] on the boards until I got on the [illegible] I wouldn't take water there.

Q. In order to take water, after being on the [illegible] and after climbing on the shelf, [illegible] order to take water again you would have to [illegible] and on the boards [illegible] up the coal bin and crawl down to get to the water place again?

A. I wouldn't have to crawl down, I could jump down.

Further direct examination.

When the engines moved south from the [illegible] and I saw the south engine [illegible] after that, was north. I saw the [illegible] engine. The engines moved [illegible] were moved; that would be [illegible] two movements. [illegible] they moved and I got [illegible] there. I had a light in my [illegible] man I saw, [illegible] on the south engine, [illegible] to me, the second engine from the south, I [illegible] my lantern. My [illegible] I could see a lighted lantern [illegible] on the engine, and while the [illegible] made or after it was made south, I saw McMannaman and his other switchman at that time standing on the north-bound track. When I got back on the engine as we left the switches to go north I got up to where I was standing, for the purpose of taking water, and stood there where I had that as a place to hold on in safety. When I saw the engine move south, after the first stop, after the south engine was coaled, the second movement, when I say I didn't hear any signal or bell, the coaling operation was completed before that move was made south.

Further cross-examination:

From where I was standing, the first coaling operation, I could see the outline of the chute go up, and the outline of a man.

Q. But it was black dark?

A. There was a reflection in the sky.

It was in back of him, but the light in the sky reflected. There were two electric lights in my cab, one a small one and one a big one. One was near the front of the boiler and the other was near the center of the cab where it goes over the tender. While I was on that shelf ready to take water I hung onto the top of the cab; not the roof, but I could take hold of the side; not the side, but I could hang onto the cab most any way. All this time while I was going through the switches north and south, stopping and starting, I was hanging onto the top of the cab. The cab reaches out over the tender; you could hang onto it most any place. I could hang onto it most any place. I was hanging on various different places. I can't tell you any of these places; I know it was the cab of the engine; I just know I had hold of the cab of the engine.

[illegible] Ray McMannaman, a witness on behalf of the plaintiff, testified:

I live at Waukegan and am a boiler maker by occupation at this time. I was employed by the defendant in the year [illegible]. I left its service July 6, 1925, or 1926. I had been in the service of that company about eight years, as engine [illegible] and switchman. I worked in the yards at Waukegan, Racine, Kenosha, Grand avenue, and Chicago. I was employed by the defendant as [illegible] [illegible] at [illegible] during the months of November and December, [illegible]. My duties were breaking up and making up trains and doing industrial work. At [illegible] I had charge of a crew. An ordinary switching crew consists of a fireman, engineer, two switchmen and a foreman. My duties were comprised of breaking up of [illegible] trains that came into the terminal and took out different cars of [illegible] [illegible]. "Breaking up" trains means separating and [illegible] [illegible] is getting them together. I did switch all kinds of cars, too, passenger as well as freight. The trains I broke up during the fall and winter of [illegible], the freight trains came from Milwaukee and Butler and the passenger [illegible] came from Chicago. I was familiar with what was known as the heating plant in the roundhouse at Waukegan. It was a stationary boiler, connected with pipes which heated the passenger depot and baggage room, and the engineers' and firemen's room and the coaches in the yard. At that time the baggage room was just north of the depot (it also heated) the waiting room, just across the main track of the southbound track, and the steam pipes were [fol. 60] all over the coach yard. Besides the passenger station and the baggage room it heated the shops. Besides the passenger depot and the baggage room it heated the firemen and engineers' locker room and coach yard; that is all I know. These coach [illegible] were heated by the plant, they heated the coaches in the yard. They have a line of pipe that extends out in the yard about two feet under the ground, and a steam line connected on with a valve and that is connected with the coaches. During the fall and winter of [illegible], prior to the [illegible] [illegible], this plant heated any coach that was set in that particular track, if it was cold. I couldn't tell you where these coaches came from; they were put in [illegible] in the yard and sent here. I saw coaches taken out of [illegible]. If any extra coaches came on trains, and we had orders to take them off, we did.

Q. Do you know of any coaches that were taken out of the trains and left in the Waukegan yards?

(To which question defendant objected, which objection the court overruled; to which ruling defendant excepted.)

A. Yes sir.

Q. What coaches were taken out, of what trains?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. There were coaches taken off train 151, due in Waukegan at 6:10.

Sometimes one, two and three coaches were taken out of that train and placed in the coach yard. They were used in any train that needed extra coaches.

Q. After they were taken out of the train No. 151, at 6:10, what was done with the coaches, were they connected with the heating plant or not?

[fol. 41] (To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. Yes sir.

After the coaches were taken out of this north-bound train No. 151, if they weren't used during that day, they would be sent back to Chicago. That heating plant was used for the purpose of heating suburban coaches used in the suburban service between Waukegan and Chicago, and intermediate points. I was one of the men who went from Waukegan to Beach on the night of December 4, [illegible], when plaintiff got hurt. I was the foreman of the switching crew. That was our regular work, to go from Waukegan to Beach. Customarily, that was one of our first duties; we did that as soon as we went on duty at ten o'clock at night. I generally left one man of my crew in the yards and one man in charge of the engines. I didn't convoy any engine from Waukegan to Beach for the purpose of coaling. We sometimes take two, three, or four engines together. My crew had just one assignment; there was only one at ten o'clock and that finished it. I and my crew had to do with one engine. If we only had one engine we took just an engineer and fireman. If we had two or three engines to go the dispatcher or roundhouse foreman ordered that done. It wasn't unusual to take two or three engines on that trip; we did that two or three times a night. When we came back from Beach with the engines that were supplied with coal and water the hostler would put them on the [illegible] went out in the morning and came in the [illegible]. I took one engine that was supplied with coal and [illegible] it in the yard, and it would be continued in service the next [fol. 68] day if they needed an engine, or if it had been assigned any particular service. On the night in question when I came to the roundhouse, the engines were ready on the ready track; we didn't have anything to do with that; the roundhouse foreman sees to that, to get them ready in advance. I don't know whether, when I arrived on the night of the 6th, the four engines were coupled together at that time. I first saw them when they were coming up the lead; I was in the office; they were coupled together at that time. Prior to that time I gave no directions as to coupling them together or as to who was to ride in any one of them. I went with these four engines to Beach. Fleming was my engineer, Kucera was my fireman and St. Martin was a member of my crew. I didn't know who the others were at that time, but afterwards I knew who they were. I don't know on what engine St. Martin rode. Fleming was on the leading engine north, Bolle was next to Fleming, Teresky was on the next or third engine. Teresky was not a member of my crew. Kucera, who was Fleming's fireman, was on the south end. I believe he was a qualified engineer at that time. Enroute to Beach I rode the southerly engine. All four of these engines had steam on, and that would mean they were live engines. On the way north, Fleming's engine was used as the propelling engine and Kucera's on the way south. I don't know whether Fleming used steam or not, as I wasn't on his engine, but I know whether Kucera used steam; going north I was riding with him. I had made that trip many times. We operated north on the northbound main line, which is the west track, between Waukegan and Beach, extending all the way to Beach; there are just two main lines. When you get to [fol. 69] Beach they made one [illegible] stop at the [illegible] for the passing track for the northbound main. When we came to a stop we started to put water on the engines, and I opened the switch to put the engines in the clear; we had to get in the clear of a passenger train. All of these [illegible]

[illegible] Sunday and Belle were [illegible] the water off. We [illegible] through we [illegible] over on the [illegible] of the other side. This train [illegible] over on the side track. It [illegible] the first were [illegible] After the train went [illegible] to get under way. I [illegible] to come over [illegible] on the northbound [illegible] there. [illegible] I had to [illegible] When we [illegible] the next [illegible] wide. It [illegible] that was [illegible] engine [illegible] I had [illegible] evidence for these [illegible] to move [illegible] of the [illegible] up, then I [illegible] got down to [illegible] on the track. [illegible] I don't know [illegible] put in the first [illegible] before I got there. [illegible] At that time [illegible] off the track [illegible] from the [illegible] out- [illegible] of the [illegible]

When he hollered the second time I went to his assistance. I didn't know it was Bolle until we got to Waukegan, but knew it was an employee. I identified the man who was injured by that engine as being Bolle. I saw these engines make the one move after I got down to where they were being coaled; that was the movement to the north. [illegible] operated the engine that made that movement, using (fol. 43) engine 1647, the second engine from the south. I don't know what was the number of Fleming's engine. The engine Bolle was on, they used for the heating plant, was a road engine; if I am not mistaken it was a class "R" engine. Fleming's was a switch engine. The one next to Bolle's going north was an "R-1", I don't remember what the south engine was. The R-1 is larger and has more power than the R. Class R engines are still larger than a switch engine. The switch engine has got a flat tank and the road engine or class R engine has probably about an eight inch space between the coal tender and the water tank on the outside and a sidewalk around it. The tank comes up higher on the R and R-1, and there is a place or ledge around the tender. On that train of engines, in the movement from Waukegan to Beach that night, we had headlights and tail lights on the front and rear. These engines were backed up towards each other, the most northerly one facing north and the most southerly one facing south. They were back to back, these four engines. There were no headlights lighted between the engines. There were lights in all the cabs. There was no artificial light at the coal chute. There are lights at the water spout; I don't know whether they were lit that night or not. This train No. 151 that I say arrived in Waukegan about 4:30 o'clock in the morning, and from which these coaches were taken that I mentioned, that train was bound for Milwaukee.

Cross-examination:

The coaches that were taken out of that train No. 151 at Waukegan carried passengers between Chicago and Waukegan. These cars that were taken out at Waukegan stayed (fol. 44) in the yard here at Waukegan until they were ordered to go back to Chicago. No passenger trains were made up in Waukegan, except in cases of emergency, to go north of Waukegan. Whenever passenger trains were made up at Waukegan west from Waukegan [illegible] age. Any passenger coach that was [illegible] in the yards here at Waukegan would be any place we were to be send it. We used these engines making up these [illegible] trains. We didn't make up passenger trains. These coaches went on any train we were ordered to place them on. We might be told to put a coach on train 366. This movement, on the night of the accident, of these four engines, from the roundhouse to the coal chutes, was a movement in the yard limits. The coal chutes are in the Waukegan yards. The crew of which I was foreman was a yard crew. So far as the operation of any of these other engines was concerned, take on the day after the accident for instance, my crew didn't operate these engines on their various freight runs or local freight runs or any such run as that. On this trip this night, from the roundhouse to the coal chutes, before going to the coal chutes, some water was taken on some of the engines; before we got as far as the coal chutes. We would have to go, on that track where we took water, to get to the place where we took coal, one hundred yards south and come back three hundred yards. The water spout, which I call the penstock, is not on the same track as we came south on. One coal chute is south of the other. In order to take the water you have to go farther south than the coal chute where we had to take coal. The side track we got on to let the through train go by is right at the depot at Beach. That is south of the north coal chute (Ex. 56) and just opposite the south one. It was south of the water pipe and west of the northbound track, west of both main line tracks. On this night in question we had taken water on one of the engines and completed that watering and was taking water in the latter engine at the time I found it necessary to stop the watering operation and get on the sidetrack. The engine we watered first was the switch engine, the farthest engine north, Fleming's engine. I didn't give any orders; I got off the engine and gave a signal to the engineer to come ahead. I looked back and I saw the water on, and I hollered to the engineer and he blew two blasts, and he didn't shut it off and I walked back there, and that is the reason I used the language I can't mention here because we have a lady reporter. [illegible] when coaling engines up there we took coal from the north coal chutes and sometimes from the south coal chutes. We found out regularly and ordinarily from the coal chute man at which one of the two chutes we were to take our coal. We found that out on the night of the accident. I first saw the coal chute man that night on the northbound track before we got in the clear. That was when we pulled up and stopped to take water and Knoore called to me and said we had to cross over for coal at the south chutes. While we were taking water the coal chute man came and told me, or some member of my crew, who later told me, that we were to get our coal at the south chutes. This coal chute man was the man who instructed us where to get the coal, but he would take the coal himself. The only place where we could get information as to which particular chute to use, or which bin to use, was from that particular man. Neither I nor any member of my crew, or any man with me [fol 60] that night, had any duty in connection with that. The place where this water spout is, where you take water, has light posts there. I couldn't say whether or not those lights were lighted at the time we took water on the night in question. Ordinarily and usually they are lighted. That does not furnish us with at least some light by which to take water; there is a reflection if the lights are lit, but the water spout goes over the tank of the engine; we don't take water; the fireman takes the water. The fireman is a member of my crew. We turn the water pipe around for him so he can do that; the switchman or myself. There are artificial lights that light up the surroundings to some extent at the place where you take water. It was while we were taking water, and while water had been taken on one engine and partly taken on another that this coal chute man first showed up. At that time I seen him getting on the most southerly engine. Later, Knoore, who was operating that most southerly engine, told me that the coal chute man said that we were to take our coal at the south coal chute. I did not have any talk with the coal chute man myself, at any time. That information having been given me, I knew it would be necessary for us, in order to take our coal at the south coal chute, to go north to this crossover and cross over on the southbound track and come south on that track. It was on the northbound main track that the engines stood while they were taking coal. With reference to all of the movements after our engines got through the [illegible] and down to the coal chute, the coal chute man directs these movements. He gives the directions to the engineers. This coal chute man was there on the job this night in question and before this accident happened, giving these direc- [fol. 60] tions. There wasn't anything unusual than what ordinarily occurred. He gives his directions verbally. I know he was giving them that night because I heard them. I was on the northbound main track, sixteen or eighteen feet away from the engine, on the side away from the coal chutes, directly in front of them, the engines being between me and the coal chute man. I could hear him giving directions to operating the engines, as to which slide to use, and whether to back up or move forward and so on. Just before this accident happened the coal chute man let some coal down into the second engine from the south; then he released the slide and it went up; then I discovered that there was a man up on top of the third engine from the south. After the coal chute man put up his slide I heard him tell the operator of the engine Kucera was on, the second engine from the south, to back up. The engine that Kucera was on went ahead; it backed up to the next chute north. The engine Kucera was on was headed north, and this order of the coal chute man was an order to back up the four engines north, in a northerly direction. At once after the order was given Kucera backed all the engines north; that is what the order meant. He (Kucera) followed that order at once after it was given. I seen a man up on the engine next north of that engine, which would be the third engine from the south, before that; I knew he was up there before, because he had the coal chute down. I don't know how long before, one or two minutes. I don't remember exactly what the time was. I had time after I discovered him there, and after his order was given, to do something. I did not do anything, I didn't think they would do anything while that man was there. In this brief instant of time [fol. 61] that I saw this man I didn't know who it was. I thought it was the coal chute man.

Q. So, so far as you were concerned there, there was no occasion for you to do anything to stop that movement?

(To which question plaintiff's counsel objected; which objection the court sustained; to which ruling defendant excepted.)

I did not think it was the man on the third engine from the south who had given the order to back up. The impression I was under was that there were two coal chute men there. There was no reason that I know of why any other person except a coal chute man should be there. The members of my crew there at the time of the accident who would be engaged on the following day, the day after the accident, December 8, in operating any of those engines, were Kearns and Fleming. I couldn't exactly tell you what engines they would be, but we did the same thing every day; I mean that might be taking those same engines to Beach for coal the next day. They would take any engines assigned to them the next day for coaling at Beach. At that time I didn't know what switch engine would be assigned to use on the following day. A switch engine has a flat tank and the coal bunker sets directly in the center of the water tank and there is a space about eight feet back of that that is perfectly flat and on the sides it is about eighteen inches. That is a switch engine; the heavier engine was a type of road engine; it wasn't an engine like the switch engine I have described. It had a ledge around the coal like a round ledge, eight or ten inches. The road engine that was used as a heavier engine had that ledge. That ledge was about eight inches and only on the sides; on both [fol. 46] sides the full length of the coal bin. Just before the accident, I don't know where Fleming was, but he was supposed to be on his engine, and I know nothing to the contrary as to that. Kearns was in the cab of the second engine from the south. I and my helper were over on the other track. The coal chute man was up on top.

Q. And the riders of those engines, that is, the men from the train crew that were riding the other two engines, the third from the north and the second from the south, were supposed to be in those cabs, is that right?

(To which question plaintiff objected; which objection the court sustained; to which ruling defendant excepted.)

I figured that they (Hollis and Kennedy) were in the cab of the engines.

Q. Was that the place where it was their duty to be?

(To which question plaintiff objected; which objection the court sustained; to which ruling defendant excepted.)

Q. Is that the place where they customarily, in like circumstances, would be?

(To which question plaintiff objected, which objection the court sustained; to which ruling the defendant excepted.)

There was nothing unusual in taking three or four engines coupled together to get coal. That was something we did every night. When we had more than two engines, some one had to ride the third one and some one the fourth. That wasn't done by my crew. Customarily, and at the time of the accident, those engine riders would be in the cabs of the engines. After this accident I uncoupled the [fol. 68] engine and telephoned from [illegible] for an ambulance and took Bolle off the engine and placed him in the engine, on the seat of the cab, and went to Waukegan. I did not go back afterwards to the place of the accident at the coal sheds; I left a man to bring the engine back. I took away from the scene of the accident three engines. They had been coaled. There had been three engines coaled before the accident happened. I took these away with me and left one there that they hadn't coaled, with instructions to coal it and bring it back. So far as I know that was done. My duties in connection with the taking of the coal only commenced after all the coal was taken on all the engines; I didn't have anything to do with taking of coal. I and my helper were just standing until the operators of the engines and the coal chute man were finished with taking the coal. We were standing some distance away from the engines, partly to keep away from the dust, probably sixteen or eighteen feet from the engines. Taking coal on these engines raises clouds of dust and makes considerable noise. At the time that the order was given to back up, just before the accident, the coal chute man was on top of the tank of the engine and I couldn't see Kenney; he was, presumably at least, in the cab. The way the engines were standing there at that time, there would be [illegible] between where the coal chute man was standing on the second engine from the south, and the place where the other man was standing out to be Bolls was standing, on the second engine from the north, the two ends of both of those engines. There were markers lighted on the rear of the last engine, and when the engines go north they had it on the south end; a marker burning on the rear end of it, and the north end too. Those [fol. 66] lights did not throw any light around the space between the most northerly and the most southerly engines. This was a dark night.

Redirect examination:

Neither of those men who were on the engines, or number two or three engines, had any lighted lanterns; I didn't see any. The coal chute man stated to the engineer, presumably Kucera, to back up. The language he used, in substance, was "Back up to the next coal chute." That particular engine was headed north, and the tank of it was towards the south; the tank would back up north. The engines were all coupled together. When I heard the coal chute man say "Back up," it lead me to believe that the engine was to back to the north; that particular engine was headed north. Besides the two coaches counsel for defendant asked me about, that were taken out of train No. 101, I saw other coaches put into other trains northward bound; I don't recall at this time what trains I saw them put into. They were going north, whatever the destination of the train was, or wherever taken out of the train, Milwaukee or Kenosha, or Racine, or any place. I was familiar with train operations between Milwaukee and Chicago, and between Waukegan and Chicago. Some through trains make one or two stops into Chicago, and others stop at North Chicago, Highwood, Highland Park, Wilmette, Evanston, and Chicago. Some of the trains from Milwaukee passing through Waukegan in the morning stop at Waukegan, Highland Park, Evanston, and Chicago.

Q. State whether or not passengers to intermediate stations customarily or frequently alight from those trains at [fol. 68] Waukegan and then use suburban trains to intermediate stations?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. When a passenger is going to get off at a suburban station on a southbound train from St. Paul or Minnetrains, they generally change at Kenosha for a suburban train.

Q. Have you any knowledge whether passengers from Milwaukee on a train get off at Waukegan and [illegible] suburban train to intermediate points between Waukegan and Chicago?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. No sir.

Q. Have you ever seen passengers, or had occasion, in your business as a trainman, to observe whether passengers were alighted from trains and then used suburban trains from Waukegan to Chicago, or intermediate points, rather?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. Yes sir.

Q. When have you seen that?

A. On a number of occasions.

Q. What is the fact about it as to whether passengers frequently did that?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. I don't understand your question.

Q. As to whether passengers got off at Waukegan and [fol. 66] then used a suburban train to go to intermediate points between Waukegan and Chicago?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. I have seen it a number of times.

Recross-examination:

I had seen that during my service here for the defendant before this accident happened, but I cannot remember when it was, or what year or what time of year it was. In answer to a question by plaintiff's counsel, I said that I had seen two coaches put into a suburban train at Waukebegan, that statement is not correct; I never remember putting two coaches on any northbound train; I never remember putting more than two; only one, and as to when that was I don't recall. I remember of putting a single coach into a northbound train here at Waukegan many times before this accident happened. That coach came out of the Waukegan yard. I don't know where it came from before it got into the Waukegan yard. It would not have been put into the Waukegan yard off of some southbound train unless it was bad weather. I don't know whether it was bad weather or not. It couldn't have been in the Waukegan yard over twenty-four hours. I don't know of any one instance how long it was in the Waukegan yard; it was just in the yard. That was nearly every day in the year. It was not an empty coach; there was a group of empty coaches there. I don't mean any particular one coach that I put into a northbound train; it was one of the surplus coaches that was in the yard, and I didn't inquire what the purpose was in putting it into the train; I under- [fol. 67] stood it must be for passengers or wouldn't be in the train; as far as I know that was the purpose of putting such coach into a northbound train.

Further redirect examination:

That coach, the coaches that were put in the north-bound trains at different times, were heated by the heating plant in the yard if it was cold weather; if in the summer time it was not.

Further recross-examination:

I know we did that work in the winter and summer. I don't know where the car went after I put it in the train, except it went north. I don't know whether it carried any passengers or not, or what the passengers were if it carried any.

Further redirect examination:

I know it went into a passenger train bound to points outside of the State of Illinois. The destination of the train was Milwaukee or beyond. This coach could have been taken out before it got to Milwaukee; it could be set out by the train crew at Beach or Zion City. Some northbound trains stop at Zion City and the first [illegible] stop is Kenosha.

EMIL CARL BOLLA, a witness for the plaintiff, testified:

I live at Rockford, Illinois and am a brother of the plaintiff. I am thirty-six years old and a carpenter by occupation, working for different carpenters at Rockford. I was employed by the defendant in November and December [fol. 68] 1922, leaving its service July 15, or 16, 1923. I was in its service from August, 1919 until that time. In November and December I was assistant night roundhouse foreman, and had been such since July 1, 1922. The day foreman was Mr. Klump. The plaintiff, my brother, Geng, entered the employ of the defendant either the 15th or 16th of November, 1922. Mr. Klump hired him. After he was hired I had a conversation with him, the substance of which was, I instructed him to go to Tony [illegible], and take orders from him, and do as Tony told him to do and follow his instructions, in case I went away. Tony was an engine watcher who had been in the service two or three years. The general duties of engine watchers are to watch the fire and water the engine. We had a heating plant there in Waukegan in the fall and winter of 1922. The customary method of heating the various buildings and instrumentalities that were heated was to heat them with a stationary boiler, located in a part of the roundhouse. At the time Geng entered the service the stationary boiler was not in use. On November 15, in place of the stationary boiler, a locomotive was being used. That locomotive was used until November 28, and then a stationary boiler was used. Between the 15th and 28th, any kind of a locomotive that happened to be there, and not in use, was used to heat the plant; no particular or specific locomotive. The heating plant was connected up with the locomotive by means of a pipe connection; a temporary connection. When plaintiff started to commence firing on the boiler I instructed him how to fire the boiler. I [illegible] Tony giving him instructions. After the 28th the stationary boiler was used in heating the plant. I was [illegible] [illegible] at work on the night of December 4. This boiler [illegible] [illegible] [fol. 69] the locomotive when used in the [illegible], heated the roundhouse, passenger depot, baggage room, [illegible] [illegible] the [illegible] roundhouse, roundhouse foreman's [illegible] register room, engineers and firemen's [illegible] car, bridge and building bunk car, car- [illegible] and the turntable. The pipes in the [illegible] yard were used to supply heat for the coaches; [illegible] coaches that needed heating in the winter time. I don't remember whether the maintenance of way car was heated [illegible] I think it was. The roundhouse foreman's office was used by the roundhouse foreman; the engineers' register room was used by engineers and the firemen to register on their arrival and departure. Waukegan is a terminal. The engineers' register room was used by all engine crews tied up in Waukegan; I know whether that room was used in connection with the operation of trains [illegible] The bridge and building bunk car employees of the building and bridge department used to sleep and eat in it; they lived in it. They were carpenters who repaired sidewalks, bridges, fences, water tanks, etc. They had made [illegible] for bridges and tracks and things like that used around the tracks in the maintenance of way [illegible] in the maintaining of the tracks, etc. and signal [illegible] The oil that was stored in the house was used to oil up [illegible] cylinder oil, valve oil and waste and [illegible] signal lantern oil.

[illegible] Ray McManaman, recalled on behalf of the plaintiff, testified:

The most northerly of those four engines was my engine. When I worked in Waukegan I used it in our night's switching [illegible] delivering cars to the [illegible] making up [illegible] trains. I did that on the night in question [illegible] it was used at [illegible]

Cross-examination.

[illegible] the same engine in my switching [illegible]

Further redirect examination:

I don't remember on which assignment we [illegible] after the completion of that day. I had reference to that when I answered defendant's counsel's last question.

Further cross-examination:

Later that same night, after this accident, my crew completed that assignment with that most northerly engine, in switching here in the yards, until our day's work was finished. I don't remember whether we worked overtime that morning or not; the time expired at six o'clock the following morning. I remember that that night after the accident [fol. 71] we placed two coaches on track three and two on five, delivered two coaches to the E. J. & E. and made up on the Butler job.

EMIL CARL BOLLE, recalled in plaintiff's behalf, testified:

Direct examination:

My hours as night roundhouse foreman were from 6 A. M. to 2 P. M. the following day. While I was acting as night roundhouse foreman and immediately prior to my illness, Mr. Klump was not at work; he was sick. During that time I frequently worked overtime. I would get through with my work on overtime anywhere from nine, ten or eleven o'clock the next morning. As the night roundhouse foreman I was familiar with the operation of through trains that passed through and stopped at Waukegan. I was familiar with the operation of trains northbound from Chicago en route to Milwaukee and points beyond. Prior to my illness there were two or three cars customarily taken off train 151, arriving around eight o'clock or after in the morning, set out in the coach yard, and another train would pick them up in the afternoon and take them back to Chicago.

Q. What was done with these coaches while they were in the yard during the cold weather, if anything?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. They were [illegible].

Train 101 originated at Chicago and its destination, so (fol. 72) far as I know, was Milwaukee. The origin of the train they were put into and moved back to Chicago was Kenosha. I had lived in Waukegan from August, 1919 until December, 1925. I worked for the railroad and lived here all that time. I was somewhat familiar with the operation of trains and train schedules.

Q. You may state whether or not, during that time, trains were operated from Milwaukee and points beyond there to Chicago, that did not stop at all intermediate stations?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. Yes sir.

Trains made stops in Waukegan to unload passengers for stations between here and Chicago where this first train did not stop. Some of the through trains made their last stop here and went straight to Chicago.

Q. Others made what other stops?

(Here defendant's counsel asked that the record show his objection to all this line of testimony, and the court ordered that the record show such objection, its overruling and defendant's exceptions to such rulings.)

A. Highland Park, Evanston, and Chicago.

There were through trains that operated between Wisconsin and points beyond and Chicago that stopped here, then in Highland Park and then Evanston, and Chicago. There are a number of intermediate stations between here and Chicago. Passengers desiring to go to intermediate stations disembarking here at Waukegan used suburban cars from here to intermediate stations. These suburban cars were made up at Waukegan.

fol. 73 Q. State whether or not the coaches that were put in these suburban trains were, in the said winter, heated by the heating plant in the roundhouse here in Waukegan?

(To which question defendant objected; which objection the court overruled; to which ruling defendant excepted.)

A. They were.

The turntable was near the roundhouse [illegible] and was connected by pipe lines with the boiler or locomotive heating plant. These pipes connected with the turntable for the purpose of keeping it from freezing in the winter, ice forming on the rails. This turntable was used for turning all classes of engines. We had [illegible] engines in the roundhouse, and switch engines and freight engines were stored in the roundhouse and passenger engines were stored outside and large freight engines were stored outside. These engines that were taken into the roundhouse by means of this turntable were used as road engines in all kinds of service. I know whether engines that were taken in there were used on the road. I know that by knowing what job they came in on and went out on. I knew in a general way the men who were in charge. This turntable was used in conveying engines to within and without the roundhouse; that is the only means we had to get them into the roundhouse.

Cross-examination.

I had duties as assistant night roundhouse foreman there in connection with passenger train schedules. I had to know what time they were due to arrive there, for several times we had material coming on them from Milwaukee or Chi- [fol. 74] cago, or Kenosha, on passenger trains. Material for engine repairs, for engines we had stored in our roundhouse. That had happened many times before December 4, 1922. I don't remember the times; I should say about fifty times, in all my experience, from the time I went to work to the time of the accident, possibly more than that. Before the accident I had been working for the company at Waukegan something like three years. That was the occasion for my learning about passenger train schedules. There were trains that came from both north and south. We got materials for engine repairs on passenger trains coming from both north and south. We sent wires or messages to the master mechanic requesting these materials. He was located at Chicago. That is the principal place of business of the defendant; where they have their big shops and their big stores. We would not get materials for engine repairs on the southbound train very often. Several times we got repairs from Kenosha. During the three years I worked there, before my brother got hurt, that occurred. I don't remember the exact number of times; several times, two or three times, from the north. I knew the time of all the trains, not in connection with engine repairs but the knowledge of a roundhouse foreman's job. We had to know the time they were due there in case we wanted to have material arrive there, or there might be such time when an engine needed repairs and we had to get ready for them. Those were the only things, the matter of engine repair, material coming on a train or there being some necessity for repair in connection with the engine or some car on the particular train. Outside of these two things I had to keep no track of the train schedules of southbound trains [fol. 76] through Waukegan. On those several occasions when I would have knowledge about the time of the arrival of northbound trains through Waukegan I observed passengers getting off of southbound trains, in the morning; some particular train each morning. I didn't see them for three years, only occasionally. Possibly half a dozen times during those three years. It is hard to state about when those half dozen times were, during those three years. During those three years I worked nights all the time. It was some morning when I had been working overtime and had occasion to be around there at the time this train arrived from the north in the morning that I saw passengers get off. These southbound trains all run on the southbound main track through Waukegan, and suburban passenger trains that go from Waukegan to Chicago, either coming from the north or made up at Waukegan, run on the southbound main line track between Chicago and Waukegan. When I would see passengers get off of the southbound trains I would be on the platform near the southbound track, on the way home from my work. That would not necessarily be the only time I would be on the southbound platform; I may take material over from the roundhouse to be taken to Chicago, put it on the train, or hand it to the baggage man. That was part of the duty of a roundhouse foreman, at any time. I did that in the morning. I worked from 6 P. M. to 8 A. M. I saw these passengers get off the train at Waukegan in the morning between eight and nine. If I was on duty at that time I was working overtime. That happened on two or three different occasions during the three years prior to this accident, possibly seven. Some of these pas-

[illegible] would get off this through train and then [illegible] [fol. 76] a suburban train here and probably I would be talking to the engine crew or anybody in particular that I knew. I didn't watch these passengers; I happened to see them. Some people did get off, men and women and children. While talking to the baggage man or somebody else I watched them all the time after they got off until the suburban train later started up and went south and observed that they were the same passengers that got on the suburban train that got off the through train; I happened to be standing alongside of them. I would see a woman get off the train and walk onto the other train. I have seen that six or seven times in three years. I couldn't say where any of these passengers came from; and I don't know where any of them were going. I am willing to testify that at any time during those three years I watched any single passenger get off a north train, southbound, here at Waukegan, and later saw that same passenger get on a southbound train here at Waukegan; men and women alike. I saw that on several different occasions, and I was not interested in watching them and had no interest in knowing where they came from or where they were going. All of the time I was not necessarily talking to somebody on the platform while this happened; standing there waiting for the train to go by so I could cross the track; the train that they got off of; and so soon as that went by I went across. When I saw them get on the suburban train I was standing right alongside of them. They got off and made few steps and got on the other trains. The trains were on different tracks. I do not know whether they stayed on the suburban train after they got on. I don't know whether they actually [fol. 77] traveled on the suburban train or not; I saw them sit down in the seat. The only instrumentalities of any kind heated by this heating plant in the coach yard, that were not stationary buildings, were coaches. The passenger depot was a stationary building; the baggage room was a stationary building; the engineer and firemen's bunk car was a stationary building; a dismounted box car. The engineers' and firemen's register room was stationary; the foreman's office was stationary, the bunk car was stationary; and the maintenance of way car was stationary; the oil house was a dismounted box car, a stationary building. The coach yard itself was stationary. As [illegible] man I was familiar with the business that was carried on at these various buildings that I have told about. As such [illegible] foreman I had to go [illegible] to these various places in the performance of my duties, at times. When I showed my brother how to fire the stationary boiler I did not say "Now George, you may go and fire the stationary boiler," but I took him and showed him how, in detail. In connection with my brother taking orders from Tony Turnsky I said that when I was not there he would take orders from Tony Turnsky; if I went away and anything came up that bothered them he should ask Tony about it. I did not intend to appoint Tony there as a consultant foreman or anything of that kind. I thought Tony would be of assistance to me and help me in a general way. Not in connection with teaching my brother; he told all of the rest of them; supervised all the rest of them, engine men and stoker pit men, altogether five or six. They knew their business; I left it to Tony when I was away, to see that they done their work in a proper manner and my brother [fol. 78] was in the same category with the others. The difference between firing a locomotive engine used as a substitute for the stationary boiler and firing the stationary boiler, is that we had to force it on the locomotive and it was a natural draft on the stationary boiler, and that makes a difference in the work the fireman has to do; it is harder to fire the stationary boiler. The first experience my brother had there firing at all was firing a locomotive, a switch engine. The first few days he worked they used a switch engine, then they put the stationary boiler into work, and I think they used that up until the date of the accident. I know now, but did not know then, what kind of an engine it was they were using at the time of the accident. It was number 214, class "E", a small engine. With reference to my testimony on the subject of cars being taken out of cooler here at Washington, I saw them do it, from the [illegible] to the warehouse, and at the same time that I discovered these [illegible] at other times. I saw that, during the [illegible] years before the accident, a couple of dozen times, possibly about twenty-five times in those years. It was always from No. [illegible] out of which cars were taken that were carried from Chicago, and they were taken out of it at Washington and put in the [illegible] and then later they [illegible] were put in other trains and taken [illegible] the kegan to Chicago. So that as the [illegible] [illegible] [illegible] never did anything except [illegible] from Chicago [illegible] gan and go from Waukegan [illegible] to [illegible]. [illegible] cars get (off) the train going north. That was the train No. 151, which was the regular train that came here every morning. That is all I ever observed during all those years before this accident, with reference to taking pas-[fol. 79] senger cars out of trains at Waukegan, whether the trains were going north or south. I am testifying from what I saw myself with respect to that. I [illegible] the scheduled time of arrival of that train 151 on December [illegible] 1922 at Waukegan was [illegible], so that any time I saw that [illegible] was there at the passenger station at [illegible] in the morning. My brother Gene was hired there as fireman of the heating plant in the roundhouse, and that is what he was on the pay roll as.

Redirect examination:

Train No. 151 was destined to Milwaukee.

Recross-examination:

I know that because it was on the time-table, and I went to Milwaukee on her. I don't know the date, sometime in July or September, 1922. So that I am testifying that in either July or September, 1922, train No. 151 went to Milwaukee. That is not the only time I knew anything about it; I knew otherwise because they were scheduled to go there. It was part of my business as roundhouse foreman to know all that. We had time-tables at the roundhouse to tell where all trains went and where they were, and it is from my familiarity with those time-tables at the roundhouse from which I am testifying now.

[fol. 80] Dr. William S. [illegible], a witness for the plaintiff, testified on a former trial and his testimony was read at this trial by plaintiff's counsel, as follows:

Direct examination:

My name is William S. [illegible] and I am a resident of Waukegan, being a practicing physician and surgeon in [illegible] county and state and engaged in the practice of medicine and surgery for 23 years, having graduated from Rush Medical School of Chicago. I am connected with the Victory Memorial Hospital in Waukegan. I knew the plaintiff in this case, Eugene Bolle. I first met and treated him, I think, on December 4, 1922, seeing him that night in the Victory Memorial Hospital located in Waukegan. At that time he had a compound fracture of the thigh, which means that the bone had penetrated through the tissues to the outside surface of the leg. This was in the right leg. I can't remember anything further about his physical condition excepting that it seems to me that his pulse was fast. I gave him something to relieve his pain and put his leg in a fracture box and dressed the wound. That was all we did for him that night. I remained with him about an hour, and left orders for the nurse. Subsequent to that I was in daily attendance upon him for sometime. During that time a record was kept of his condition which I consulted daily in the hospital as well as seeing him every day. If I remember correctly, within a few days we sent him to the office to have an X-ray picture taken, which showed the bone broken in several places, there seemed to be a couple [fol. 21] of pieces of bone broken off from the rest and the outer portion of the lower fragment was sticking across the thigh. The lower part of the inner was away down on one side and fractured through the skin. He ran a temperature right along of from 99 to 101 and sometimes as high as 102, which was caused by the pain from his injury. The circulation was not good in the foot, that is, his toenails and feet at all times were sort of blue and a tendency to be cold. The record which I have consulted for purposes of refreshing my recollection was under my supervision and kept in the regular routine of business and actually shows the condition of Bolle from time to time. I gave this patient proper medical care and treatment to the best of my ability and in an endeavor to save his leg. This leg was amputated after X-ray pictures as to its condition were first taken.

Mr. Wilson: The necessity for the amputation is not disputed, your Honor.

I haven't the X-ray pictures with me but I decided after viewing the case and three or four others consulting with me that it was best for him even considering the gravity of losing the leg. The operation was performed about two or three weeks after the accident. I don't remember the date. If the hospital records show that it was December 20th, that was the correct date. I don't remember whether on the night that he was admitted to the hospital, December 4, 1922, I anesthetized the patient at the time to make an examination, but the record would show what was done. I think Dr. Gavin was there that night and probably Dr. Foley in consultation with me in reference to this case. Dr. Gavin is the local physician for the Chicago & North Western. I don't know who Dr. Moore is but it seems to me [fol. 82] that Dr. Hopkins is the general surgeon, and he saw the patient in this case, and it was our belief that the amputation was necessary. The leg was amputated 4 or 5 inches above the knee at about the juncture of the middle and lower third. After that the patient ran a higher temperature from stirring things up and there was quite a lot of shock after the amputation of the thigh, his pulse was fast, he was white and showed signs of shock. I don't recall the condition of his nervous system on or about December 6th and December 10th. I didn't figure at that particular time that he was a nervous individual. I thought he was a good strong young man going to it like a strong man would. These conditions caused pain and he had lots of pain and was given morphine for it, if I remember correctly for several days. We tried to set the leg on the first night under an anesthetic, but on account of the compound fracture it was difficult to do that. We put him asleep and put on considerable extension to tire the muscles out and bring the bone back into place if it was possible. The stump looked at first like good healthy tissue and bone. Later on there were necrotic spots here and there which was on the order of a big boil. There was bad tissue and that had to be taken out and touched up a little to try to get it to heal up. By the term necrotic or necrosis we mean death of the tissue. I don't remember whether or not the foot was gangrenous at any time. My impression is that it was a bluish condition. To improve the condition after the leg was amputated I opened those places where it was broken down and cleaned it out, which I did by scooping it out with a curette or knife. This was done without administering an anesthetic. We [fol. 83] put the limb in a fracture box and put on extension on it when I first came to the hospital in an attempt to set the leg. The notation on the hospital record that the stump of the leg was ragged probably meant that the tissue was broken down. I don't know about using a bichloride solution. I probably curetted the stump during the month of January, for instance on January 10th. On several occasions after he got out of the hospital he would come in and have what you call a boil, which was broken down tissue. I removed granulated conditions but I don't remember the date. On the 11th there was considerable pus drainage; if the record shows that on the 12th or 13th of January there was a slight operation performed to incise the stump, it is true. I don't remember all that. I haven't any independent recollection of what was done on each of the times and when and I don't know that I could refresh my recollection as to the particular date. I know that I did it several times. A good many times. This is the hospital record counsel got from the hospital. He (referring to plaintiff) was there (referring to the hospital) until the 28th of January and then he returned again on the 31st of January at 4 p. m. and remained there until February 10th. I don't remember what the physical condition of the plaintiff during his second confinement in the hospital was, unless it was the breaking down of the tissue in the stump and I gave him the same treatment, that is, I incised or curetted the stump, and applied hot applications. And, if the record so shows, he was in the hospital there for continuous treatment during that time. I don't remember whether he came back to the hospital for treatment after February 10th. I do know he was in the office several times to let me see the stump, but I do [fol. 86] not remember about his coming back to the hospital. At the time he left the hospital the last time I was reasonably sure that I had done all that I could for him at that time without further amputation, and these treatments that were rendered when he came back to my office were for the purpose of curing the condition. If I remember correctly he came in occasionally when he would have a little red spot on some part of the end of the stump. Maybe I would scrape it out with a curette and maybe that would cure it. Maybe he would come in where that would happen two or three times, when he left town. There wasn't any evidence of necrosis or infection in the side of the opening when I saw him last. I considered he was getting along better. If he had a little place where the tissue was breaking down it was probably from poor circulation. As to his general physical condition when I first saw him, aside from the injury, I considered him a healthy young man. The blood examination was practically normal, just the least bit below par, as far as the red corpuscles are considered. That could be caused by the shock of the accident and the injury and the infection. Assuming that this patient's temperature continued to run from 100 to 102¾ over a period of weeks or months, in my opinion, it would have definite significance to me as a physician that he had some infection in his system through that injury or wound. We always get an increase in temperature after an operation like that, but in the ordinary case of amputation after the shock, and after the effect of the operation or amputation subsides and the stump heals, you do not find an increase in temperature and if the tissue continues to necrose every day and continues to do so for weeks and months it would indicate in- [fol. 85] fection in that open wound. And if, after my last treatment of the patient that infectious condition necessitated other treatment by other doctors and finally another amputation it would have been caused by the initial injury to the tissue and no resistance on the part of the patient. I have not examined the patient recently.

Cross-examination:

The last time I saw the plaintiff to look him over at all was several months ago. I did not have the entire charge of his case from the time I first went to see him. Dr. Foley, who is my partner, did. Dr. Hopkins also saw him a number of times. Drs. Hopkins, Moore and Gavin are doctors for the railroad company. Dr. Hopkins being the chief surgeon at Chicago. Dr. Moore is assistant and Dr. Gavin the local doctor at Waukegan for the North Western. They were interested in the case and came to see the young man at various times. It was not necessary to put him to sleep to do this work on the stump from time to time when the red spots came. It was painful but I don't remember putting him to sleep. Most of the red spots were scraped out without pain and some were painful. I did not see the plaintiff after a certain date when he left. I know his home is in Woodstock but I do not know where he went from here.

It must have been two to four months that I did not see him, at which time I understood he was out of town. Later he came back to my office one day at which time I do not think I saw the stump. He came in to let me know he was back and getting along and did not seem to require any treatment at that time. I only saw him once again after that which was the only time he was in the office. He was back several [fol. 66] months ago. I don't remember just how long. Probably June or July. He went out of town and I didn't see him for a long time and the next time he came back was a week or ten days ago when he was in the office and I did not examine him at that time nor have I examined him since.

Redirect examination:

Dr. Foley was my partner, but the other doctors—Hopkins and Gavin, are railroad doctors and came into the case in the interest of the railroad company without being selected by the plaintiff in this case. I didn't call in either Dr. Gavin or Dr. Hopkins. My bill for services has not yet been paid. Assuming that I did the things the hospital record shows I did, namely, on the first night plaintiff was admitted, performing an operation on him in which operation he was under an anaesthetic from 11:35 to 12:25; that I again operated on him on the 20th of December, in which he was under an anaesthetic from 10:04 until 11:05 and in which operation I amputated the leg at the thigh, as testified and that a gangrenous condition manifested itself in the stump, requiring subsequent currettement on several occasions and irrigation of the stump, necessitating the administration of solutions to help that condition, and on January 10th I removed granulations by the use of the curette and on the 11th there was considerable pus and on the 12th I administered a local anaesthetic and incised the thigh and likewise on the 13th cauterizing the wound on the 15th and injecting some solution into the stump and cauterizing the wound again on the 17th and likewise on the 23rd of January, giving him the daily treatments that I have testified to and that he was under my care from January 31st to February [fol. 67] 16th and that I did perform those services without referring to anything else in the case covering that period of time. I am familiar with what would be a reasonable and customary charge for services, which would run around five hundred dollars. I have not been paid anything for my services in this matter.

Plaintiff's Exhibit 1 offered and received in evidence.

Plaintiff's Exhibit 1, the hospital record of Belle, consisting of ninety-four pages, only the first page of which has been numbered in this record.

Plaintiff offered in evidence two rules out of a printed rule book, as follows:

"30. The engine bell must be run when the engine is about to move and while approaching and passing public crossings at grade."

"7. Definitions: Train.—An engine or motor or more than one engine or motor coupled with or without cars displaying markers."

(To the introduction of each of which rules defendant objected; which objections the court overruled; to which rulings defendant excepted.)

Whereupon said rules, as above quoted, were read to the jury and into the record.

Plaintiff rests.

Here the defendant's counsel moved the court, orally and in writing to instruct the jury to find the defendant not guilty, handing to the court and filing with the clerk such written motion together with a written instruction in accordance therewith.

Which motion the court denied, and which instruction the court refused to give to the jury; to which denial and rulings defendant excepted.

[fol. 66] TONY [illegible], a witness on behalf of the defendant, testified:

Direct examination.

I was working at defendant's roundhouse at [illegible] at the time plaintiff got hurt. Had been so working a couple of years before he got hurt, about two or three. I was at the coal chutes at the time he got hurt. At the time Bolle got hurt I was up on an engine, on the fireman's side, on the seat box in the cab. My business at the roundhouse was mostly everything I guess. I was known as an engine watcher. I remembered seeing plaintiff working there at the roundhouse. I used to show him how to fire the stationary boiler or stationary engine. There were four locomotives at the coal chutes at the time this accident happened; coupled together. I was in the cab of the second one from the south. From the time the engines left the roundhouse I got out once at the water spout, and stood around. Bolle got up and took water on his engine. I did not tell him to do that. I didn't hear McManaman tell him to stop taking water on his engine. At that time I was standing around there some place. It is a pretty long time ago. Except for that time that I was out of my engine at the water pipe I was in the cab of my engine all the time during that trip up to the time that Bolle got hurt. From the time that we took water up to the time that Bolle got hurt I did not at any time see Bolle up on the tender of his engine. At the time he got hurt I did not know that he was on the tender of his engine. My duties in connection with riding the engine I was on up to the coal chutes and back was to take care of the [fol. [illegible]] steam and water on that engine. That engine did not take any part in operation up there or back; nor did Bolle's engine. I did not take part in the coaling operation that night, or tell Bolle to take part in it. I saw the coal chute man there that night. At that time I weighed about one hundred or one hundred eighty-one pounds. I was about five feet ten inches tall.

Cross-examination:

I now weigh [illegible] or [illegible] or 170 pounds. I must be the same height. Besides watching engines at the roundhouse, [illegible] around there, stoked fires, blocked the [illegible] and occasionally had to [illegible] [illegible] when it would [illegible] up. About the accident to Bolle I don't know and don't remember all of it. I don't know how long Bolle had worked there; he [illegible]. Everybody showed him how to do his work, and everybody else that worked around there; I mean his brother, the night foreman. Nobody else there that night at that time was doing the [illegible] the locomotive used in the yard, in firing that [illegible] engine. There were men who [illegible] the [illegible] engines, removed the ashes and [illegible] [illegible] out around there. I know that Belle was put on the engine for the same purpose I was put on mine, to keep the fires up and watch the water in the boiler. When the engines got down to Beach they stopped at the coal chute, then they stopped and backed up, to leave a train or so. We took water on some engines, one if I ain't mistaken, Belle's engine, as far as I know. I have no recollection of taking water on any other. I first saw Belle after I got up to the water spout by the tank; I saw him up there when I got [fol. 90] over there; he was up there already when I saw him. At that time I was standing on the side, below. I couldn't tell you who was all around there; the train crew was all around there. I didn't order him up on there to take the water; I couldn't say if I am sure of that, besides I found him up there. I did not tell him to get up on his engine to take water. I don't know how soon after my engine stopped at the spout that I found him up there. I don't know if McManaman was there at that time. I don't know who was foreman of the switching crew. I didn't have any boss there. I was not a boss. I got off my engine to take a walk around. I don't know how long I walked around before I got back on again. I don't know how long he stayed up there. I know I saw him on it; that is all I know. I know he was up there when he got hurt. I couldn't say if I saw him up there before he got hurt on his engine taking coal. I don't know about testifying on the last trial of this case that I did see a man up there on the engine taking coal but didn't know it was Belle. I couldn't say whether on the trial of this case in February, 1929 I was asked if the engine I was on was the engine next south of the [illegible] engine and answered that I was pretty sure, or if I then knew that he was on top of that engine and answered that I didn't know if it was him or not, that I knew it was somebody. I couldn't say if I did or not so testify at the other trial.

Redirect examination:

With reference to the time of the beginning of [illegible] [illegible], at the same time it happened I [illegible] [illegible]

When I heard that holler I did not know who it was that hollered. I did not know after the holler who it was that [illegible] had been hurt until we went up and seen who was hurt; we saw afterwards that it was Bolle. Before the accident happened, before I heard that holler, I did not see Bolle or anybody else up on top of the tender on the engine next north of the one I was in. If there had been some one on that engine, back of the cab, standing on the tender, I could not have seen him from where I was standing; impossible. It was not a part of my duty to thaw out the turntable. When I said that I would sometimes thaw out the turntable I meant just to help out.

Recross-examination:

Everything I did was just to help out. At the time Bolle was injured the engines moved north. I was not exactly paying attention to what was going on; I was pretty sure they moved north. Before Bolle got hurt I was looking towards the direction the engine was headed, north. I was on the fireman's side. Engineer Kucera was on the east side. I had a view to the north from the fireman's window. The coal chute man was on the engine. He always carried a lantern. I don't know whether when I saw him he had a lighted lantern or not. I don't remember now if I testified at the last trial of this case that I didn't remember which way these engines moved; that I understood the track; at the time Bolle got hurt the engines were moving north.

Further redirect examination:

I had no duty at all to perform with respect to coaling of the engines or moving of the engines. Sitting there on the fireman's seat box in the cab of the engine, I was on [illegible] the side of the engine away from the coal chutes.

[illegible] Kucera, a witness for the defendant, testified:

I live at Waukegan and am now a Ford salesman, selling Ford automobiles. In December, 1922, here in Waukegan, I was a locomotive engineer in the employ of the defendant. During that employment and about that time

I also acted as a fireman. I was the fireman in the switching crew of which McManamon was foreman, early in December, 1939. I remember the time that plaintiff got hurt at the coal chutes up near Beach. I was there at the time that he got hurt. I acted as fireman on the most southerly engine going to Beach. On the ride from the roundhouse to the coal chutes I was on the most southerly engine. Before Bolle got hurt I operated as engineer the most southerly engine when we pulled into the passing track at Beach to let a superior train pass. That was before water was taken on the engines. I really don't recall whether we took water before we pulled up the passing track or after the superior train had left. The most northerly engine operated the string of engines from the roundhouse to the water tank or pipe, moving north. When this string of engines were moved northerly they were operated by the most northerly engine, and when the movement was south the most southerly engine operated them. I operated the most southerly engine bringing the string of engines down south to the crossover to the coal chutes. I saw the coal chute man that night. He was somewhere near the coal chute when I first saw him, I don't remember just where. [fol. 93] I think it was right at the coal chute that I saw him there. He was on the ground. When I first saw him I had stopped to pick him up. As I saw him up ahead there I stopped to pick him up. The purpose of picking up the coal chute man was that he was the man in charge, to put coal on the engines. After I picked him up he gave us instructions as to stopping, starting and coaling of the engines. That was the usual and customary way of doing that work there at that coal chute. I had been there before the night of the accident a great many times for the same purpose I was there that night. The most southerly engine was the first engine to take coal that night. At the time it took coal I was on the engineer's seat box of the most southerly engine. At the time the coal was taken on that engine the engines were standing still; I had brought them to a standstill, on the directions of the coal chute man. I believe that there were two coaling operations done on that most southerly engine that night. None of the employees of the North Western Railway Company at that time had anything to do with the matter of [illegible] [illegible] the coal onto the engines at [illegible]; that was done by a man in charge of the coal chute who was not a member of [illegible] crew on those four engines. These coal chutes are a long building with a lot of different bins in it, with a slide on each bin. The engine to be coaled has to be spotted where one of the slides can be let down to the tender, or to the coal part of the tender of the engine. After we took coal on the most southerly engine, in the two operations I have testified to, I then got on the second engine from the south. I then pulled the bell cord, started the automatic bell ringing, and moved, on the coal chute man's instructions, to [fol. 96] spot the engine for coal, and did spot the engine for coal. Then the coal chute man took coal into the second engine from the south; he put the slide down so the coal would run into the tender of that engine. At the time he was doing that I was sitting on the engineer's seat box on the right hand side of the cab of the second engine from the south; the side next to the coal chutes. Sitting as I was there the boiler and cab of the engine were ahead of me. The cab is back of the boiler; the boiler is the round long part of the engine, and the front end of that is the front end of the engine. The next engine north of that engine was headed south. So far as that engine is concerned you could see the boiler and cab of it if you looked out of the cab of my engine, sitting where I was, if you could see; it was dark this night and I couldn't see anything. Sitting down on the engineer's seat box I was lower down than the boiler of the engine next north of me. I have been out of the railway service since June 11, 1928.

(Photograph marked defendant's Exhibit "Y" for identification.)

I am familiar with what is known as the "B" type of road engine. Exhibit "Y" is a photograph of a class "B" type road engine.

(Defendant's Exhibit "Y" offered in evidence. Defendant's counsel stated that the photograph was offered to illustrate the testimony of the witness as to the boiler and cab of such an engine; as a matter of fact the tender of the engine shown in the photograph is full of coal; it isn't to represent the engine [illegible] was on at the time of the accident but simply to illustrate the other [illegible] engines and where the boiler and cab are.)

Defendant's Exhibit "Y" received in evidence.

[fol. 90] Defendant's Exhibit "Y", photograph of defendant's locomotive engine number [illegible].

After the coal chute man took coal on the second engine from the south he let the coal slide go back in the chute; it is weighted down to go back. The next thing that happened after that is I heard plaintiff holler or yell. Up to that time I knew plaintiff was on the third engine from the south. Before I moved our engines at the time he got hurt I had not seen him anywhere on top of any of the engines. My engine was standing still when I heard that holler, and that was after the coal chute man had taken coal on the second engine from the south. The holler that I heard indicated to me that some one must have been hurt. When I heard the holler I did not know who it was that hollered. I learned afterwards that Bolle had been hurt, between the cab of the engine and the slide of the coal chute. I saw Bolle after he was hurt, lying across the roof of the cab of the third engine from the south. I could see that his leg had been injured. I could tell from what I saw how his leg had been injured. He was hurt while I was spotting the second engine for coal and his leg got caught between the chute, being down and the roof of the cab. Sitting in the cab of my engine, as I was at the time that I heard the holler, I could not see a man if there were one standing back of the cab of the third engine from the south. Sitting on the engineer's seat box I would have the length of this boiler and the length of the boiler on the other engine and the cab (ahead of me) and I couldn't see any man on the next engine there. This engineer's seat box that I was sitting on, on the second engine from the south, was below the top of the boiler on that engine and below the [fol. 91] boiler of the third engine from the south and below the cab of the third engine from the south. These two boilers and the cab of the third engine from the south would be between me and any man standing on the cab of the third engine from the south.

Cross-examination.

I believe I testified in the trial of this case in [illegible] and again in [illegible]. There may be a few things that I have [illegible] gotten about this incident. I remember the trip from Waukegan to Bench and that I rode the most southerly engine. There was nobody on the engine with me. McManamon didn't ride on my engine. He was foreman of our switching crew. I believe he was on the second engine from the north. He had to throw the switches after the engines passed over. I don't remember of him riding on my engine. When we arrived at Bench the most southerly engine stopped just to clear the passing track switch, which we had to enter to clear the superior train. We took water on one or more of the engines either before or after we cleared to let the superior train go through. To the best of my knowledge I remember taking water on one engine but don't remember which engine that was. The water spout is located about three hundred feet north of the passing track switch. I was in the south engine at the time that water was taken; I had nothing to do with that. I heard no order given by anybody to adjust the water spout or anything of that sort. It is customary for the foreman in charge of the engine to throw the penstock around and the fireman to take the water. I don't remember who took the water that night. When the engines were operated from the west track, or northbound main, onto the passing track, [fol. 97] I used the south engine as the propelling engine. Then when they were moved northward again, over on the east track, across the crossover, they were operated by the most southerly engine; that engine was operated by myself. The movement north was made by the north engine, in charge of Fleming. When we got over the switch we started back on the east track towards the coal chutes, started back south. When we got off of the west track we got over on the passing track to let a superior train go north on the west or northbound track. When we moved in the first instance from any track the movement was made by the south engine. When we got back on the east track, north, the movement was made by the north engine in charge of Fleming. When we got over the switch where we could come back on the east track, then I moved the engines south with my south engine. I first noticed the coal chute man that night at the [illegible] end of the [illegible] coal chute. I stopped to pick him up, and started the bell by hand and then opened the automatic bell ringer. I did that after the coal chute man got on. Before he got on the bell was ringing and it stopped when I stopped the engine. When he got on and I started up to make this rear movement I put on the automatic ringer again, and got the automatic bell ringing while the engine was in motion. From where the coal chute man got on, down to the stop at the first coal chute, it was sixty or seventy feet; I couldn't say how far the distance was from where I stopped to pick up the coal chute man to where I made the first stop to coal the most southerly engine, because I don't remember just what chute I stopped at. I was wrong in making that statement that it was sixty or seventy or one hundred feet; [fol. 98] I don't remember what chute I stopped at. I know where number fifteen chute was. If it was number fifteen that I stopped at it would be one hundred to one hundred twenty-five feet. During all that time we were making that movement my automatic bell was ringing. When we came to a stop at the coal chute I stopped the bell. That south engine was headed south, the pilot was facing south and the tank was towards the north. I didn't see the coal chute man adjust the chute and put coal in the tank back of where I was sitting; I seen him when he left the cab to get up, when he walked up the coal rack. At that time I was on the right-hand side of the cab, the west side of that particular engine, and the coal was being taken from the east side at a point north of where I was seated in the cab. I couldn't actually see the coal man adjust the chute and let the coal automatically drop into the tender; I couldn't see through the roof of the cab; you are sitting in the engineer's seat box and cannot see it, unless you stick your head out of the window. An engineer sitting in the cab of his engine cannot turn around and look back and see the tank of the engine and see a man working there with the coal chute. There is a back in the cab that comes high enough to obstruct your view to the back of the tender. I couldn't see this man on my own tender that put coal in that first engine after he walked up out of the cab. He climbed from my cab through onto the tender, climbed up; he didn't go around it. I heard coal put in the engine and didn't see that man until after he came down in the cab. I heard the coal going in, and knew when the operation ceased when he came down in the cab and told me so. After

[illegible] over the [illegible] [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] cab, who [illegible] [illegible] see the cab [illegible] [illegible] [illegible] the [illegible] [illegible] from the [illegible] towards the [illegible], you could not see the [illegible] anything. What there was to prevent me from seeing a man standing on the back of the second engine from me, [illegible] feet, when standing on that [illegible], the first thing [illegible] is the back, and the next thing you get [illegible] the boiler of your own locomotive and the next locomotive, and another cab on that second locomotive. The two boilers are [illegible] ing each other and at the same level. I am sitting on my cab and I admit that I can see over the boiler on my side not over the boiler, but you can see directly ahead, because you cannot looking over it at an angle; your seat box is lower. When sitting on the seat box and looking out ahead on the track, to see if anything is on the track, you are not looking over your boiler; you are looking straight ahead. [Fol. 101] Your cab extends alongside of your boiler; you are looking straight ahead. I mean you are seated alongside of the boiler, [illegible] over. You can see to the left that part of the country or track or anything ahead of you to the left for a distance, and clearly to the right. The boiler does not come all the way over to where you are sitting in your cab. The boiler of the [illegible] engine does not come over all the way either, while you have to look over that to see the cab or the tender of the other engine. Sitting on the seat of my engine, and looking ahead, I cannot see a man standing on the tender just back of the cab of the second engine from me; I cannot see him through the cab. The cab of the engine comes up more than a distance [illegible] of two feet higher than the boiler just over the seat box, shown in the photograph. A man standing [illegible] place here (indicating), a six-foot man, does not [illegible] his body up over the roof of the cab. There [illegible] [illegible] [illegible] [illegible] [illegible] the second engine, [illegible] man, and he stayed inside the engine and told me to move, and I moved north, at that time I was heading north. I did not see or hear anything to the north of me at that time. I didn't hear the noise of coal dropping down into the tender of the engine and didn't see anything ahead of me. I made that spot. I don't remember how far I moved to make that spot. If I spotted at the next one I came to I would have to go possibly five feet. How close the coal slides are together has nothing to do with it. Chances are there are a lot of times you would not have to move at all to make [fol. 102] that spot; get from one engine onto another; that engine might have been spotted right for the chute. The second engine was not spotted right; I had to spot that; had to move some distance, north. As I started that movement I heard no exclamation or outcry or anything, and then I stopped and the coal chute man got up there and pulled down the chute after I stopped. That is, he climbed through again and got up and pulled down the chute and let the coal fall into the second engine from the south; then the chute went up by itself; the operation was completed. Before I started the second time to spot the south engine I started the bell ringing, and the bell was ringing while the engine was in motion; I kept the bell ringing while the engine was in motion. After I stopped I stopped the bell from ringing. After I and the coal chute man got on the second engine, and when he told me to move north, I started the bell in operation; the automatic bell. It was ringing loudly when I started out that time; I am sure of that. I don't know how far you can hear those bells; it all depends on where you are, and it would depend somewhat on weather conditions, on the way the wind was blowing. At Beach, possibly you could hear the bell on a good clear night about a block, in that location. When I got on the second engine from the south and initiated that movement I kept that bell ringing until I stopped again; and that was a north movement. I moved north and kept the bell ringing while moving north; when I stopped the engine I stopped the bell ringing. When I moved south in response to the order of the coal chute man I started the automatic bell ringing and kept it ringing while making that movement to the north, and when I stopped the engine I stopped the bell. Then [fol. 103] everything was quiet when I stopped the bell outside of an engine or two popping around there, valves popping on locomotives. The only engine that was used at this time was the engine on the north and south. When I went to spot the second engine from the south I used that engine. These engines were not being used at any time except the time when I used them for spotting. If I was going to spot the third engine from the south I would use that engine to spot it. After we made the last movement to the north, in response to the direction of the coal chute man, and stopped the bell ringing, I did not hear any steam escaping at that time, but there was other noises; four generators running on the engines; that made considerable noise, constantly. I heard no noise when the coal chute man was taking coal, until after he completed the operation, then I heard a shout. That was the first intimation I had that anybody was hurt. I believe, but can't swear, that the coal chute man had a lantern with him that night. I had markers along there, which would indicate to me where to stop, on the coal chutes. It is a balance rod on the chutes that I always went by. You would not exactly call them markers; it is a balance weight that hangs on the bottom end of the coal chute; I refer to them as markers; I took them for where to stop my engine; they are known and recognized as markers, meaning the place to stop the tank of the engine; they are not exactly markers, but we took them for that in making spot stops. There were lights in all the cabs of these engines. I don't remember, on the trial last year, whether you asked me, referring to the third movement, which way I moved on that last movement, north or south, or whether I answered that I just didn't remember.

[fol. 104] Redirect examination:

The locomotive shown in Defendant's Exhibit "R" is another view of the same locomotive shown in Defendant's Exhibit "Y," but taken from the rear of the locomotive; that is a class "B" engine. Looking at Exhibit "R," in connection with my testimony that the cab of the third engine from the south would be between me and any man who might be standing on the tender of that engine, I point out on the photograph the cab that is shown there on that engine in the picture. That partition at the back of the cab shows the back of the cab. I am pointing to the highest [illegible] of the engine shown in the picture—and which curves from one side to the other so that it is highest in the middle, that extends from one side to the other out beyond and even with the side line of the tank.

Defendant's Exhibit "R" offered in evidence.

In connection with the offer plaintiff's counsel asked and obtained permission from the court to ask certain questions of the witness, whereupon the witness testified as follows:

This Exhibit "R" is a view of the same engine shown in Exhibit "Y," but from the rear. The objects shown on top of the tank are, manhole cover and automatic train control box. There were some engines with them on and some with them off. I don't remember whether that engine Number 82 had it on or not. This also shows something across the engine here in front of these two objects that I have been discussing; that is the rear of the coal rack. You cannot see into the cab at all in that view shown on Exhibit "R," on account of the coal; looking from the rear the coal obstructs the view.

[fol. 106] Defendant's Exhibit "R" received in evidence.

Defendant's Exhibit "R," a rear view of locomotive No. 82.

Further redirect examination:

The cab on a class "R" engine is the same on each engine of that class. Looking at Defendant's Exhibit "R" for the purpose of refreshing my recollection I should say that from the rim or top edge of the tank, not taking into consideration these coal boards or whatever you call them, it would be about five or six feet to the top of the cab roof on a class "R" engine. It is not my understanding that the balance on the coal chute which I have referred to as a marker was put there as a marker so a man stopping an engine could tell where to stop. We always had land marks along the railroad track like stops and spotting at coal chutes and we call them markers; for instance, timbers extending from the side of the chute. We call them markers because we use them as markers, but they really were not markers.

Further recross-examination:

This automatic train control box that is shown in this Exhibit "E" were not in use back in [illegible]. When the yard foreman would tell me at any time to move to another chute that was the only direction he gave me. I had charge of the movement of the engine before I moved it and stopped it at the place where it could be coaled.

[fol. 100] Further redirect examination:

As a matter of fact under the circumstances that existed at the time in question, I could not have moved from a standing position hurriedly. There was a cab on the engine ahead of me, on that engine; it was this side of the tender and the engine was headed south; that would bring it between where I was and the tender of the engine that the cab was on.

Further recross-examination:

When I made that last move I didn't see anything on or near the engine just ahead of me. I did not see a man climb down from the chutes. If it was down and emptied any coal from the chutes I could not have seen it. There is no such thing as starting faster at one time than another time in the operation of a locomotive when you got four engines. Suppose you have a whole train of engines you cannot start faster if you open your throttle wide enough. You couldn't start those four engines rather abruptly if you wanted to; it couldn't be done. You always have to take up slack to start with one of those small engines; take up slack between your couplers; it all depends where the slack was; we wouldn't always have the slack in there. If the slack was in your couplers you would have a little bit quicker start, but not a very fast start; maybe you would start with a little jerk. If you were not careful in starting you would pull out your drawbar.

Defendant's Exhibit "X," a diagram, drawn in pencil by counsel for defendant, offered and received in evidence.

Defendant's Exhibit "X."

[fol. 107] EDMUND PAUL FLEMING, a witness for the defendant, testified:

Direct examination:

I have been a locomotive engineer for twenty-eight years in the service of the defendant. Early in December of 1922 I was the engineer of the crew of which McManaman was foreman. My fireman was Adolph Kucera. I remember the accident to plaintiff at the coal chutes north of the roundhouse here on the night of December 4, 1922. I was on the leading engine going north when those four engines went up to be coaled that night; I was operating that string of engines while I was operating the north engine. The trip the engines took was from Waukegan to Beach, and in on a sidetrack at Beach to let a through passenger train go by, and crossed over onto the southbound main track at Beach down to the water tank. I did not operate my engine at any time except when they were being moved in a northerly direction. That most northerly engine was a switch engine or yard engine. In my experience, before the time this accident happened, I had acted as engineer on what are known as class "E" engines, and had acted as fireman on those engines. Defendant's Exhibit "Y" is a photograph of the class "E" engine with which I was familiar at that time; and so is Defendant's Exhibit "Z". Taking Defendant's Exhibit "Z", the cab of the engine that is shown in that picture, the rim or top of the tank part of the engine, the roof of the cab on that class of an engine is, I would say, five or six feet above the rim of the tank. The sides of the cab come out as far [fol. 108] as the side lines of the tank. Assuming you have two engines, one of them a class "E" engine headed south, and the other engine headed north, with their noses together, with the head ends coupled together, and shown in the diagram you have drawn which is marked Defendant's Exhibit "3", you could not see anything on the top of the tender of the other engine, which is headed south, just looking through the cab window ahead of you if you were sitting in the cab of the engine headed north. I stopped operating the most northerly engine after pulling the other engines up north of the north switch of the crossover. From then on until the happening of this accident I took no part in operating the string of four engines. During that time I was on my seat in the cab of the next northerly engine; and that engine was headed north. I had nothing to do with it from that time in connection with this coaling operation. I had been there at these coal chutes before, as an engineer, and was familiar with the customary and usual way of coaling engines at that place. The switching crew took no part in the actual putting of the coal into the tenders of the engines. The men employed at the coal chutes had charge of that. With respect to the movement of the engines while the coaling was going on, most always some member of the train crew, from the ground, would take orders from the man in charge of the coal chute. I had not received any orders myself up to the time of the accident from the coal chute man. After I stopped operating the engine that operated the string of four, up to the time of the accident, they operated it from the other end. I did not see the coal chute man there that night. It was customary for the coal chute man to give the [fol. 109] instructions with reference to spotting and taking coal, sometimes by word of mouth; sometimes he would get on the engine and tell whoever was operating the engine what chute to take, by word of mouth; sometimes he would be in the coal chute and would give a signal with a lantern. Before this accident happened I was looking in the direction of south. I did not have any duty with respect to looking in that direction, or anything to do in connection with that; not a thing. I was not paying particular attention to the coaling operations. I don't remember now as to how many engines were coaled or how many spots were made or anything like that, before the happening of this accident. I did not, at any time before the accident, see anybody on the tender of the engine next south of me. I knew the accident had happened when I heard someone holler, as though a man was in pain or had been hurt. At the same time I heard the holler I saw the coal chute fly up, and did not know it had been pulled down, and saw a man roll back on the top of the cab of the engine. Under the usual and customary practice of coaling engines at that place there was never anybody that I know of up on the engines excepting the coal chute men. The crew that I was a member of was a mixed yard or road crew. As engineer there, early in the month of December, I did not do any road work; this was yard work. This particular movement of the four engines from the roundhouse to the coal chutes was a yard movement. In connection with yard movements shown at that time, of locomotives only, such locomotives did not display markers. Markers that are displayed on trains are an electric light in a cage on each side of the [fol. 110] tank and each side of the front of the engine, the purpose being to indicate what sort of a train you are, whether extra or sections. They are different colored lights; on the rear end of just an ordinary freight train they would be red, except in rear movement. All markers are not red; they can be red, green, or white, and those colors represent different classes of trains. They are all road movements where they display markers. On this string of engines on the night in question, outside of the lights in the cabs there was a headlight on the engine headed north, on the north end of the track, and a headlight on the engine on the south end of the track, lighted.

Rule 18, page 24, of Defendant's Rule Book, offered and received in evidence, reading as follows:

"Yard engines will display a headlight to the front and rear by night. When not provided with a headlight at the rear a white light must be displayed. Yard engines will not display markers."

With reference to this string of four engines they were provided with a headlight at the rear, and that was lighted. Under this rule it was not necessary to have any white light at the rear. This string of engines on the night in question were not displaying markers. The north yard limits at Waukegan were the other side of Beach, north of the coal chutes and north of the north switch of the crossover track that I testified we used that night. This was a movement within the Waukegan Yard limits.

Cross-examination.

We had markers on this train of engines, both front and rear, the markers were there, but were not lit; not lighted. [illegible] was foreman of this operation. It was up to him to determine whether the markers should be [fol. 111] lighted or not. He had charge of the train movements. I operated these engines, four of them coupled together, over the main line of the defendant [illegible] began to Beach. There is a station [illegible] and I suppose they sold tickets. I [illegible] boarded trains and alighted from [illegible] there are but two tracks after [illegible] mile on the way to Beach and there [illegible] tracks. I operated this train of engines [illegible] for that distance with a man in charge of [illegible] Each man on each engine had some duties [illegible] to perform. When this train of engines was [illegible] ward I operated them by means of the [illegible] gine, and when they moved south they were [illegible] the south engine or most southerly engine. [illegible] engines arrived at Beach, after we let the [illegible] pass, we pulled north over the crossover and [illegible] onto the southbound main and went down to the [illegible] chutes. I don't remember if we took water on one [illegible] of the engines at some time there. The water [illegible] coal chutes are near together. It wasn't [illegible] filling station near the coal chute. I don't know whether we took water or not. We could take water from either track. I remember pulling over and taking the engines onto the southbound main, the coal track; [illegible] operating and was through until there was [illegible] movement for me to make, and then [illegible] while we were still pulling south. We had not [illegible] begun coaling my engine. The very last [illegible] ting my own engine would perhaps be made by [illegible] that time I had nothing to do with the [illegible] ments. When the engines started south to the coal chutes [fol. 112] on the southbound or coal track I was not paying particular attention to just how it was done or [illegible] doing it. I was looking back south, but [illegible] watching what was going on; [illegible] looking south, out of the back cab window. [illegible] the south engine, the most southerly engine. [illegible] see the second engine from the south. I [illegible] engine next to me; that is the only engine that I [illegible] I could not see a man on either of the [illegible] three or the one next to it from the south. [illegible] man on either one of those engines [illegible]

[illegible]

a man on the engine next to me before the accident happened. It might be possible that I testified on the last trial of this case that I saw a man on the engine next to me for about ten seconds before I heard the exclamation or shout; the engine just south of me. There were not any cabs or anything to obstruct my view of that man. As I remember now the first I notice of a man there was when the coal chute went up, perhaps it was when the coal chute went down; that is the first I noticed, of a man there, was when the coal chute went up. On a type "B" engine the top of the cab is about five feet higher than the tank, the top of the back of the tank. I think that on a type "B" engine the deck is about six or seven feet from the ground. I would guess the roof of the cab is about eight or ten feet above the deck of the engine; that is only a guess, I have not the measurements. The extreme bottom of the tank is just even with the car wheels; I refuse to guess at all these [fol. 113] feet and inches because I'll only guess it. I never made any measurements to ascertain how far above the sides of the tank, the legs at the tank at the corner of the front end, is the roof of the cab on that end. On the drawing, Defendant's Exhibit "2", I cannot see anything that looks like a cab. I know where the tool box is down in the tank like. I know that on some engines there is a ledge on these tanks that evidently goes back. I can picture how the front end of a tank looks next to the cab on these engines; there is a ledge on some of those tanks; they extend all the way back to the back end on some; on some not. On some of the ones that it does not there isn't a place over the tool box, perhaps six or eight inches below the very extreme top of the tank, where a man can stand; a man couldn't stand there. I never saw anything like your explanation on the engine. There is nothing in the pictures that shows a ledge on the top part of the tank you are talking about. I don't know whether the roof of the cab is about two and one half feet higher than the back of the tender; it is higher. When I said around I meant that that was about the same point. I cannot say whether it is two and one-half feet or not. The roof of the cab is above that part of the tank you are asking about. [illegible] and higher is [illegible]. If a man was standing [illegible] of a ledge, whether over the tool box or eight inches below the extreme edge, he would be above the roof of the cab and I could see him if I were looking that way. A man sitting in the cab of his engine, any engine in this string of engines we were on, could not see him. The engine I was on was headed north; the tank of Belle's engine was [fol. 114] against my tank; I was sitting in the seat of my cab, on the east side of it, only a distance of two tanks from Belle, so any way I could see him. If he was standing on the front end of his tank, close to the cab, and his head and shoulders and the greater part of his body was up over the cab, I don't know if the man in the next engine to his, looking north, could also see him; I don't think that he could see him; there would be one tank behind him to obstruct his vision, part of his cab and one tank behind him, and the engine and the engine cab. The man might be three or four feet, or a couple of feet, above these things. I don't know if there is anything to prevent his seeing that part that comes up from the cab, I know of no obstruction there that would prevent his seeing. The same obstruction that would prevent a man on the south engine looking towards the north would prevent my seeing the engines, the extreme south engine, and the second from the south also. I did not testify over and over again on the first trial of this case that I saw the coal chute man up on the most southerly engine putting coal in there when they first stopped nor describe with minuteness and detail every movement that was made by the engines and that I saw the coal chute man not only on the most southerly engine but on the second engine from the south.

(Here plaintiff's counsel read certain questions, purporting to have been asked at another trial of this case, and the answers thereto, to the witness and the witness said that he did not remember the answers or whether he so testified on the first trial.)

I don't remember testifying about the coal chute man's lantern. I didn't see him. I did not testify that I saw this same coal chute man on the second engine from the south.

[fol. 115] (Here plaintiff's counsel read other questions and answers purporting to appear from the [illegible] at another trial and the witness said that he did [illegible] remember whether he was asked the questions or gave the answers. This testimony was all taken subject to defendant's objection, overruled by the court; to which rulings defendant excepted. This attempt to impeach the witness takes up pages [illegible] to [illegible] inclusive, of the record.)

Our men were put on there, on this train of engines and had a foreman who was in charge of the movement. We were responsible for the movement of our engines. All that the coal chute man did was to direct us where to take coal. He had nothing to say whatever about getting from one track to another, or the manner of doing it, or turning switches or anything else. Some of the train crew did give signals at times, where to move. I have seen the foreman direct us to move from one coal chute to another; and we did that often; and that is true whether the movement was to stop, go ahead or back up.

Redirect examination.

From my experience there in the taking of coal at these coal chutes, I know that the foreman got his information on which he gave the signals that have just been referred to; he would get his orders from the man in charge of the coal chutes. I think this movement of the four engines on the night in question would be classed as a movement from the roundhouse to the coal chutes. The place I had testified, where a man could stand on any part of the tender and have all but two and one-half feet of his body extend above the roof of the cab would be on the coal [fol. 116] rack, which is not shown on these Exhibits "Y" and "Z". That coal rack is on the extreme front of the tank; it is boards or planks across, to hold the coal back from rolling down in the cab. Whether a man could stand on those boards and project or be about two and one-half feet of his body above the cab would depend on which one of the boards he stood on. These boards are arranged [illegible] in the nature of a ladder from the bottom of the [illegible] roof of the cab; they run up on [illegible] of each other, spaced in between. When I [illegible] for plaintiff that there was a place back [illegible] where a man could get and [illegible] of his body above the [illegible] one of the boards [illegible] that coal rack. That is the only place I know to stand. If he were standing on that type of [illegible] in what plaintiff's counsel called a ledge at the [illegible] of the coal bin, such ledge being at the top of the coal bin [illegible] the roof of the cab, on a man of my height, the distance would be between four and six feet up on him; that would be my best estimate of the distance.

Recross-examination:

A man customarily stands at the back of the tank when putting coal in an engine. There is always a coal chute man at the back of the tank. The tank is [illegible] with water; the coal chute is let down, [illegible] the coal [illegible] he has to go over on the engine and reach over and take hold of the chain and let the chute down. He stands at the back of the tank, between the tank and the coal chute, on the tank or the coal. If there is no [illegible] he would stand on the edge as best he could.

[fol. 127] Further direct examination:

The fireman or coal chute man, taking coal on engines, never stands between the cab of the engine and the chute. Since the trial of this case in 1928 I have never read any transcript of my testimony given at that trial.

(Here defendant's counsel stated, and the statement was accepted by plaintiff's counsel, that the engine involved in this case, No. 224, has been put out of service and junked, lost its identity as an engine, but that the photographic exhibits are of the same class, "K" engine.)

SAM CASTOPOLIS, a witness for the defendant, testified.

Direct examination:

I live and work in Chicago. I am a switchman for the Rock Island Railroad. In December, [illegible] I was working for Collins & Dice, down at North [illegible] Washington. I did not work for the [illegible] There were contractors who had [illegible] coal engines for the defendant at [illegible] paid by Collani & Dive and was not an employee of the defendant. Down there at the coal chutes at Beach I had to shovel coal and give coal to the engines; shovel coal from the cars into the chutes; it is a wooden building; I don't know how long it is; it is a long building. There are twenty chutes in the south chute. When I say "chutes" I mean coal bins. They have slides on them next to the track. When the defendant wanted any engines to be coaled at the chutes they brought the engines up there [fol. 118] on the track next to the coal chutes. In my work I had to keep the chutes there full of coal; kept them all the time full. The part I did in putting the coal into the engine was I was just the coal chute man, that is all. To put the coal in the engine I pull a chain, and the chute or slide comes down from an upright position so it goes down to the coal bin on the engine and the coal in the coal bin runs down this slide, and while it is running that way the weight of the coal on the slide keeps the slide in that position. When the coal is all in then the slide goes back up again into the chute. When I pull the chain I do not stand on top of the coal chute; I stand on the top of the tank of the engine that is being coaled. These railroad men, engineers and firemen and switchmen, would not do any chain pulling there. They would know and find out where to put their engine to have the coal put in by my telling them what chute to spot them; I told them what chute. I remember on the night of December 4, 1922 when a young man by the name of Bolle got hurt there. At the time he got hurt I was on top of the engine; on top of the coal. Somebody hollered; I don't know who hollered; he hollered and I got off the engine. The engines were moving when he got hurt. After he got hurt the engines stopped. I went to see what was the matter. I found somebody was hurt. They took him away. There were four engines there. I was on the second engine from the south when the man got hurt. He was on the third. I did not see him on top of the engine before he got hurt. When he got hurt I was telling him (the fireman) to shove the engines to another chute. I put coal on the second engine from the south. I put coal on the most southerly [fol. 119] engine first. I put coal in the first engine south two times, because he wants nine tons of coal, and there were only four or five tons in the bin, so the [illegible] he didn't fill the tender of the most southerly engine, and I had to move it to get another bin; and I did that. I put coal in the first engine twice, then I got off the engine and got on the second engine from the south, and then I gave five tons of coal. After I put the second bin of coal in the first engine the engines then moved again. Then I put coal in the second engine; five tons in the second one. He wanted some more coal, four tons more, in another engine. I tell the engineer to move back north and get another chute. He just moved a little bit and then he hollered, that fellow that got hurt. At that time I weighed one hundred thirty-five pounds. I am five feet and a couple of inches high, about five feet seven inches.

Cross-examination:

I put coal in the south engine first, from chute No. 15; the engines were then moved to the south to chute 17. They are numbered 15, 16, and 17; they start to number at the north and number south, 1 up to 20. I put coal in the south engine from chute 15 and then moved the engines to the south to chute 17. I did not then put the coal out of chute 17 into the second engine from the south; then the next movement, the third movement, was to the north to chute number 14. This was the third movement at the time Bolle got hurt. The first move was to the south, and I stopped at chute 15; then moved south to 17; the next move made was north to either 12 or 14 and that was the time Bolle got hurt. I had to get up on the tank in order to reach the chain; stood on top of the tank; there was a place on the [fol. 120] side there where I could stand; I stood on the car close to the cab; not between the chute and the cab; between the chute and the water tank. The engines were moving north at the time Bolle got hurt. It is about two or three feet from one chute to the other. I don't know how wide is the chute. From chute number 15 to chute number 17 it would be two chutes ahead, about ten feet. From chute number 17 back to 14, 12 or 14, would be quite a considerable distance. I say to the engineer, when I said to move to 14, if you want coal move the car and I give you another chute; I just said 14 next, next 14. I was right there where the engineer could hear me. I did not hear any noise. I told them when to move, showed them where the chute was, told them where I had coal. You wouldn't move back from 17 to 16 if you had coal in 15; you got to have it there; you move to where you have the coal. One bin holds five tons of coal. You have to let the chute down first, then when you get through with the operation you have to give it a start to go up, and after you get it started a certain ways it goes back itself. I had a lantern with me that night; a lighted lantern; I had a light in my hands. I testified last year; that was the first time I testified. In [illegible] I was down in Beach, but I wasn't called as a witness. On the last trial nobody asked me if I had a lighted lantern with me. The first time I was asked about that was when you asked me. I have not talked about that with any one, since it happened. The lantern was just an ordinary lantern, with oil; I carried it in my hands, not around my head. I didn't do any signaling with the lantern. I put it out of my hands, to operate the chains, and pulled the chain down. I did not leave it on the step of the engine when I crawled up to get [Fol. 121] the coal. I got on the south engine first on the north side or end of it; climbed up from the cab onto the tank; it stopped and I got up on the tank on the steps, came in through from the back of the cab, that place. I did not leave my lantern on the back of the engine; never left it down; if you left it down it was dark and you couldn't see; I crawled up with the lantern in my hand; I see what place to walk; when crawling up over the boards, up over the end of the tank, I was carrying the lantern with me; had it all the time. I saw no light in the cab of the engine, when I first got on; I don't remember. In the second engine from the south he had a light, the first I don't remember. I have no memory for lights for engines; I remember two engines have lights, one for south and one for north. I don't remember whether or not I saw any lights in the cabs. When I put coal in the first engine at No. 15, and then had the engines moved to number 17, I got down off the tank again, and go to get another engine, and got on to the other engine; I got off on the ground. I tell the engineer No. 14, going to stop at 14. We moved north to 14 the last move. I sure told him that. I had to talk loud. I tell him number 14. I was close to him. I don't remember which direction the engine was headed when I directed to go to chute 14. I know Fleming the engineer and that fat guy, Kucera. It was the fat man that was moving the engines that night; he made the three moves; he got off the south engine and got on the second engine with me. I am sure I have told you everything I know about this. I got off the engine after it moved from 15 to 17; then I got on the second engine. I have told you all the moves I made.

[fol. 122] Redirect examination:

After I got on the engines, up north of the coal chutes, after they crossed over, the first stop was at 15. I took coal there. Then we moved to chute 17 and took coal there, and then I got off of that and we got in another engine. They next stopped at chute 14, and I put coal in there. I first got coal from chute 15 on the most southerly engine, and then the engines moved to spot that most southerly engine at 17, and then I put more coal in, from chute 17, in the most southerly engine, the first engine. Then I got down from that engine and got in another engine. The most southerly engine was then full. Then I went to the second engine and went to 14 and put coal in the second engine from 14. I put coal from chute 15 in the most southerly engine, the first engine, then moved to 17 and spotted the most southerly engine, the first engine, at 17. I put coal from 17 in the first engine. Just nine tons taken out; he wanted nine tons of coal. When I put coal in the first engine, from 15 and 17, that engine was full; I put in nine tons. I put coal in the first engine from chutes 15 and 17. Then I got out of the first engine and went to the second engine; then we moved to spot the second engine at number 14, and took coal on the second engine from 14. Then the fat guy, the engineer, wanted four tons more of coal in the second engine. I tell him to back up to another chute, north, and it was then, when we moved, that this man got hurt.

[fol. 123] Recross-examination:

I don't remember nothing about talking to Mr. MacKinley about this. He come down and he tell me he was claim agent for the North Western; that fellow down there. I remember talking to that man sitting behind you. He come to see me in February, 1923. I told him, in the presence of a man by the name of [illegible], who lives at [illegible]. I told MacKinley that I put coal in the engine to the south, just coal chute at No. 15, and the engines were then moved to the south to chute 17. I didn't say coal was put into the second engine from the south from chute 17. I don't remember if I said [illegible] when moving from 17 back to [illegible]. He didn't read the statement back to me; I don't remember that time if he read it. I told him about these moves at that time. That was a short time after it happened.

Further direct examination:

If Mr. MacKinlay put anything down there different than what I said here then he got it wrong; it looks like it.

(It was here agreed that the records of the company show that the heavy engine, No. [illegible], was a class "[illegible]" engine; the same class of engine as the engine shown in Defendant's Exhibits "[illegible]" and "[illegible]". And that the most northerly engine, No. [illegible], is a class [illegible] engine. The most southerly engine, No. [illegible], is a class [illegible] engine.

[fol. 104] [illegible], recalled at the request of plaintiff for further cross-examination, testified:

Cross-examination:

I don't remember what I testified to in 1930 as to the coal chute being down at the time I heard the shout or holler. I don't remember the questions that were asked me or the answers I gave with respect to that. When I say I don't remember I mean that I don't remember whether I gave that testimony at the first trial.

Defendant rests.

[illegible], a witness in rebuttal for the plaintiff, testified:

I live at [illegible] avenue, Chicago. I am not a [illegible]. I have been connected with plaintiff's counsel in the trial of this case. On February [illegible] I had an interview with a man named [illegible] at his home in [illegible], Illinois; that is [illegible] we went inside. A man named [illegible], who lives at Bonds, was present when I [illegible] [illegible] stated to me [illegible] [illegible] were [illegible] [illegible] that coal was put in the [illegible] No. 11, that the engines were [illegible] chute No. 17, [illegible] from the south; [illegible] told them to move to the [illegible] that movement [illegible] was injured. After [illegible] to him and he made his mark [illegible] presence of myself and [illegible] there when I read it to him and he made his mark. [illegible] kamp also signed his statement as a witness.

Cross-examination:

I would have to look at the statement to be sure of the date it was taken and I would not [illegible] the number of the chutes without looking at the statement. I had no particular difficulty in understanding [illegible] when he pointed out to me the chutes where we went [illegible] at Bonds. After he pointed out these chutes to me, at the coal chutes, I went into the station and wrote out this statement myself, and then I read it to him and then he signed it with his mark. I don't believe he had any difficulty in understanding the statement that I read to him.

H. B. [illegible], a witness in rebuttal for plaintiff, testified:

Direct examination:

I am 57 years old and have lived at Bonds all my life. In February, 1923, I was in the employ of the defendant as a section foreman. I left the employment of that company July 1, 1924. I have seen Mr. [illegible] before this. I recall the [illegible] of the [illegible] coal chute man at Bonds in February, 1923. I was present when the conversation occurred. I heard what Mr. [illegible] said to the coal chute man, [illegible] he said to Mr. MacKinlay. It seems he could not write English, and he asked him several questions, and as he asked him the questions he wrote down whatever Mr. Castopolis [fol. 136] said. After the statement was taken he asked him to sign his name and he couldn't sign his name, so he asked me if I would witness it for him and I said I would and I signed my name to it. The coal chute man made his mark and I signed under it. The statement was read to him before he placed his mark on it. I do not know whether Mr. MacKinlay wrote down on that statement the information given to him by the coal chute man. The statement that he read to him was the statement that he gave to Mr. MacKinlay, and I signed my name to it as a witness. I did not know Mr. MacKinlay before that time. I do not recall anything that was said about who he was or who he represented at that time.

Cross-examination:

When Mr. MacKinlay read the statement back to Mr. Castopolis I got the impression that the statement was just a translation of the language that Mr. Castopolis had used. I do not remember that in the statement Mr. Castopolis gave to Mr. MacKinlay, which Mr. MacKinlay wrote down the translation of and then read to Mr. Castopolis, that it was said "he was hurt at chute number 4."

Redirect examination:

These coal chutes were about five to seven feet apart there. The slides that the coal runs down were five to seven feet apart.

[fol. 137] [illegible] [illegible], the plaintiff, testified in rebuttal on his own behalf:

Direct examination:

The man I saw on the south engine that night prior to my injury, or the man that I saw on the second engine from the south just before I got hurt, had at no time a lighted lantern in his hand.

Here plaintiff's counsel offered to read, from the transcript in the bill of exceptions of the first trial, certain questions and answers; to which reading of such questions and answers defendant objected; which objection the court overruled; to which ruling defendant excepted.

Whereupon the following proceedings were had:

The Court: These are the questions for which foundation was laid for impeachment?

Mr. Ryan: Yes, your Honor.

The Court: All Right.

Mr. Wilson: I object to it, if the court please, as not being impeachment directed to any material facts or testimony in the case.

The Court: He wishes to read certain questions for which the foundation has been laid. Let the record show an objection to each separate question and answer that Mr. Ryan reads from the record.

Mr. Ryan: I am reading from the cross-examination of Mr. Edmund Paul Fleming:

"Q. Were you looking out the window to look at the coal chute?

A. Yes, sir.

Q. You were looking out your cab to the south to see at which coal chute the engine would stop?

A. Yes, sir.

Q. You watched that from the cab of your engine?

A. Yes.

Q. You say from the cab of your engine you saw the coal [fol. 130] chute man up on the south engine?

A. Yes, sir.

Q. Where was the coal chute man while your train of engines was being moved to the south or somewhere?

A. I don't know.

Q. You didn't see him?

A. No."

Mr. Ryan: Now, the next questions and answers are the ones that are relevant:

"Q. Where was he when you next saw him?

A. When I next saw him I seen a lantern on top of the [illegible] engine south.

Q. Did he have a lantern?

A. Yes.

Q. What kind of a light was it?

A. A white light.

Q. You don't know who that man was you saw up there with a lantern?

A. No, sir.

Q. You could see the outline of a man but couldn't see his face?

A. Yes.

Q. You couldn't possibly hear what he said at that distance?

A. I could hear his holler.

Q. Did that man have any occasion to holler loud enough for you to hear him in the head engine?

A. Yes, sir.

Q. What was the occasion of that?

A. This coal chute man would tell you in the cab—he would give us the number of the chute and we would move along slow; we knew about where the number was; he would be on the tender and when we got spotted just opposite the coal chute he would yell. He can yell good and loud.

Q. Did you hear any other noise like that again at any time that evening before this man got hurt?

A. At that very spot.

Q. After the coal was put in this engine or moved south again?

A. Yes.

Q. Then you heard this same yelling noise again?

A. Yes, sir.

Q. Then was there another movement after that or was it at the next movement that Belle got hurt?

A. I think it was on the third movement that Belle got hurt.

Q. You were looking towards the south?

A. Yes, all the time.

Q. Did you see him on the second engine from the south? [illegible] A. Yes, sir.

Q. You did?

A. Yes.

Q. At least you saw a man there?

A. Yes, sir.

Q. And he still had his light with him did he?

A. Yes, sir.

Q. Who else did you see up on the engine, on the other engine?

A. I didn't see any one.

Q. You didn't see Belle on the engine that was nearer to you?

A. No.

Q. Let me understand you—you are looking from the cab in the most northerly engine, towards the south, looking down rather intently?

A. Yes, sir.

Q. Then the only thing you saw just before Belle got hurt when the engines moved to the north was the lantern, was that it?

A. Yes.

Q. You didn't see any man at all on either engine?

A. Just the outline of a man on the second engine.

Q. You couldn't see the outline of a man on the third engine, one engine closer to you?

A. No, sir.

Q. You didn't see the outline of any man on that engine?

A. I didn't see him.

Q. Did you see the coal chute?

A. The first I seen was after I heard the noise. The coal chute was down.

Q. It was down?

A. Yes, sir.

Q. You are sure of that; when you looked out after it moved about how far did it move that last time?

A. Only a little ways.

Q. When you heard the outcry you looked out, did you?

A. Yes.

Q. You saw the coal chute on the engine where Belle was, down?

A. Yes, sir.

Q. You are sure of that?

A. Yes.

Q. That didn't fly up at the time he got hurt?

A. Not at the time he got hurt."

Here plaintiff's counsel offered to read, from the re-direct examination on the second trial, certain questions and answers; to which reading of such questions and an-upon defendant objected, which objection the court overruled, to which ruling defendant excepted.

Whereupon the following proceedings were had:

[illegible] Q. Why was your attention first called to the fact that there had been an accident?

A. I heard a man holler.

Q. You heard a holler of someone?

A. Yes.

Q. So that you say you saw a man up on the tender of one of the engines south of you about ten seconds before you heard this scream, is that what you mean?

A. Yes, sir."

Here plaintiff's counsel read from the testimony of Tony [illegible] in February, 1908, on direct examination by Mr. Wilson:

"Q. At the time [illegible] got hurt, did you then know that he was up on top of his engine?

A. I didn't know if it was him or not. I know it was somebody."

Plaintiff rests.

Defendant rests.

Whereupon defendant moved the court in writing and orally in open court, that the court instruct the jury to return a verdict finding the defendant not guilty and with the written motion handed to the court a written instruction to the jury to find the defendant not guilty; the court denied the motion and refused to give to the jury the instruction, to which rulings defendant excepted.

[illegible] 107."

In the course of his argument to the jury, plaintiff's counsel stated, among other things, the following, and the following proceedings took place:

"* * * but we have more than that; we have the testimony of their own foreman, [illegible], a witness called by the [illegible] * * * that and you being entitled take the [illegible] of the engine and could it [illegible] and [illegible] by [illegible] [illegible] without [illegible] to [illegible] the [illegible], without bell or warning to him."

Mr. Wilson (defendant's counsel): [illegible] your Honor please. The [illegible] [illegible] (fol. 205) testify that the [illegible] was [illegible] ringing of the bell.

The Court: I don't remember any [illegible].

Mr. Ryan (plaintiff's counsel): [illegible] did. I positively remember that [illegible] the bell was rung or any warning given [illegible].

The Court: If that's your recollection.

Mr. Ryan: It is not only my recollection but it is the evidence in the case. I am not [illegible] of [illegible] lack of memory. I will leave it to the recollection of the [illegible] of the jury and I reiterate that [illegible] positively testified that he heard no bell rung.

(To which further repetition and misstatement of the evidence defendant's counsel again objected, which objections were overruled, to which rulings defendant excepted.)

Plaintiff's counsel then further stated to the jury as follows:

"* * * and not a single witness in this case testified a bell was rung except [illegible] * * *. [illegible], as you recall, did testify * * * that when the operation was completed of coaling the second engine, and while the coal was being emptied into the engine next to the north, the coal chute man gave the signal and the engineer, [illegible] sat up in the cab of his engine, looking straight towards the north, started the engines in operation without bell or warning and injured this man."

And further, plaintiff's counsel argued and stated to the jury as follows:

"* * * and the only man that says that he did not see him was [illegible], the only man that tells you the absurd, flimsy, unbelievable tale that after he looked up [illegible] these engines were backed through from the [illegible] north over the [illegible], that when he took charge of the [illegible] that he started his automatic bell ringing * * * [illegible] he said, [illegible] every move he made he [illegible] [illegible] and let the bell ring loudly before he [illegible] [illegible] and not a solitary witness corroborated [illegible] on the contrary they say it was not rung." etc.

And further, plaintiff's counsel argued and stated to the jury as follows:

"What does it avail counsel to say that Kucera's testimony now is of no significance in this case, while on the stand, in his presence, he stated that he rang the bell, which was his version of it; yet he wants you to believe that he rang a bell in the face of the testimony by McManaman that he did not hear a bell ring. Counsel has stated to you now that McManaman was not asked if the bell was rung. I definitely and specifically remember, and I am sure you men remember that McManaman testified positively and unequivocally that he heard no bell or no warning."

Further plaintiff's counsel argued and stated to the jury:

"It would seem that Mr. Kucera would have the fairness to come in and say, 'Why, I didn't look ahead, I paid no attention, I did not see this man and paid no attention to him; it was a careless movement. I did not ring my bell, I did not know where any one of these employees were; the rules of the company required me to ring the bell before we moved that engine.' Why do they have a rule if it isn't for the protection of their employees? He was entitled to warning, but he (Kucera) comes in and testifies against this man here, and that he had his bell ringing automatically. He testified to that while he was in the employ of the defendant, and he is sticking to it now, but it is contrary to all the evidence in the case."

During his argument to the jury, plaintiff's counsel made the following statements and argument on his contention that at the time of his injury plaintiff was engaged in interstate commerce:

"The defendant is a common carrier by railroad. * * * It maintains in the city a terminal yard, with a roundhouse and passenger depot. When the weather gets cold, [Tr. 183] the passenger depot needs heat. If these fellows were doing nothing else but heating this passenger depot, for the convenience and comfort of those passengers and the men and women no doubt who work there and [illegible] messages and take care of their interstate business, the work alone would be so closely connected with interstate commerce as to become a part of it," etc.

"You heard the stipulation read; every one of these engines had interstate commerce work mapped out for them; it was not a question of stipulation, or whether they may be used in interstate commerce; the work was plainly set out, and supplying those engines with coal and water for use in interstate commerce, of course is employment in interstate commerce; that has been decided over and over again. Bolle was placed in this string of engines, and while he had nothing to do with the movement of it, he was none the less engaged in a movement of interstate commerce, which was a part of that movement. Wouldn't it be absurd to hold that all of these other employes on these engines were engaged in interstate commerce, but that Bolle alone was not so engaged. No reasonable man would single out Gene Bolle on this movement, and say that he was not employed when the other employes were," etc.

"The first proposition argued by counsel is, that the plaintiff was not employed in interstate commerce, or in work so closely related to it as to be a part of it, and uses throughout his argument the word transportation, as if the word transportation added some charm to the definition. Interstate commerce is a good deal more than transportation. The Federal Statute uses the word interstate commerce. Listen to the court's charge on that subject. When the court, in his instructions, tells you what the law is, he will give you the language of the Federal Statute, and the word transportation is not in it."

"* * * Bolle was supplying heat to this passenger station, where its interstate passengers were conveniently accommodated, and where they sold tickets and transmitted messages and carried on business that took care of the interstate commerce of the defendant."

[fol. 124] COURT'S INSTRUCTIONS TO JURY

And thereupon the court gave to the jury, at the request and on behalf of the plaintiff, the following instructions:

1. The court instructs the jury that this case must be decided upon the evidence, under the instructions of the court, and not upon the statements of counsel outside of the evidence, unsupported by the evidence, if any such statements have been made. The evidence and the law alone must govern your verdict.

You are further instructed that, in considering this case and arriving at your verdict, you should not take into account or be influenced by any statement, declaration or remarks of counsel, if any such have been made, unless same are based upon or are justly and fairly deducible from the evidence.

You are further instructed that any remarks made by counsel, either during the trial or in their arguments to the jury, and stricken out of the record by the court, or to which objection has been sustained by the court, must be totally disregarded and treated as if they never had been made or heard by the jury. (Given.)

2. Neither by these instructions, nor by any words uttered or remark made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the [fol. [illegible]] jury; that is to say, they should apply them to the facts as a whole and they must not detach or separate any one instruction from any or either of the others. (Given.)

3. The fact that some of the propositions of law contained in these instructions are repeated in several different instructions is not to be taken by the jury as an intimation by the court that they are more important than others that are stated only once. All the propositions of law in the several instructions are equally entitled to the consideration of the jury, whether they are stated only once or more than once. (Given.)

6. While plaintiff must prove his case by a preponderance of the evidence, still the proof need not be by the direct evidence of persons who saw the occurrence sought to be proved, but facts may also be proved by circumstantial evidence, that is, by proof of circumstances, if any, such as give rise to a reasonable inference in the minds of the jury of the truth of the facts alleged and sought to be proved, provided such circumstances, together with all the other evidence bearing on such facts, constitute a preponderance of the evidence. (Given.)

7. You are not bound to believe anything to be a fact simply because a witness stated it to be so, provided you believe from all the evidence that such witness is mistaken or has testified falsely as to such fact. (Given.)

8. The weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of a question in dispute, but in determining upon which side the preponderance of evidence is, the jury may (fol. 106) take into consideration the number of witnesses testifying upon one side or the other of a disputed point, the opportunities of the several witnesses for seeing or knowing the things to which they testified, their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, and from all these circumstances, together with all the other facts and circumstances appearing from the evidence upon the trial, determine upon which side of such question in dispute is the greater weight or a preponderance of the evidence, and if you believe from the evidence, under the instructions of the court, after considering all the facts and circumstances appearing in evidence and the number of witnesses testifying on the respective sides of this case, that the evidence of the lesser number of witnesses on the one side of such question or questions in dispute, is more credible and trustworthy and outweighs the evidence of the greater number of witnesses on the other side thereof, then as to such question or questions, the evidence preponderates on the side of the lesser number of witnesses. (Given.)

9. The jury are instructed that in determining what facts are proved in this case, they should carefully consider all

[illegible] in the light of all the circumstances of the accident in question as detailed by the witnesses, and any [illegible] which they think may be fairly and reasonably inferred from the evidence [illegible] in the case although there may be no direct evidence or testimony as to such fact. (Given.)

10. If you believe from the evidence, that any witness in this case has knowingly and wilfully sworn falsely on this trial to any matter material to the issues in this case, [R. 257] then you are at liberty to disregard the entire testimony of said witness except in so far as it has been corroborated—if you find it has been corroborated—by other credible evidence or by facts and circumstances proved on the trial. (Given.)

11. The jury are instructed that it is provided by an Act of Congress, which was in force as the law at the time plaintiff was injured, that every common carrier by railroad, while engaging in commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. It is further provided that in all actions brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. (Given.)

12. [illegible] that if you believe from a preponderance of the evidence, [illegible] the instructions of [illegible] at the time of the accident and injury complained of [illegible] he was employed [illegible] engaged in interstate commerce [illegible] as a part of it, and that he was [illegible]

then and there, acting within the scope of his employment, and if you further believe from a preponderance of the evidence, under the instructions of the court, that the defendant was guilty of negligence, as charged by the plaintiff, then you are further instructed that the burden of proving that the plaintiff assumed the risk of his employment or was guilty of contributory negligence, is upon the defendant. (Given.)

18. If you believe from a preponderance of the evidence, under the instructions of the court, that at the time of the accident and injury complained of by the plaintiff in this case, he was employed by and was at work for the defendant in interstate commerce or in work so closely related thereto as to be substantially a part of such commerce and that he was, then and there, acting within the scope of his employment, and if you further believe from a preponderance of the evidence, under the instructions of the court, that the defendant was guilty of negligence, as charged in the plaintiff's declaration, and that the plaintiff did not assume the risk of injury at the time and place in question, then contributory negligence on the part of the plaintiff, if any, will not bar a recovery by the plaintiff, but can only be urged by the defendant in mitigation of damages. (Given.)

19. The court instructs you that while an employee engaged in interstate commerce assumes the usual and ordinary risks of his employment, he does not assume extraordinary risks arising from the negligence of the employer or his employer's employees or agents, unless he has knowledge of them and the dangers arising therefrom, or unless they are so plainly obvious that an ordinarily prudent person in his situation would have noticed and appreciated them. (Given.)

[fol. 159] 21. The court instructs the jury that if after fairly and impartially considering the testimony of all the witnesses in this case and the evidence and the facts and circumstances in evidence before you in this case, you believe from the evidence that the plaintiff, at the time of and prior to the accident in question, [illegible] care for his own safety that an ordinarily [illegible] would have exercised under the same [illegible] ditions as shown by the evidence in this case, then you are instructed that you should find the plaintiff was, at and before the happening of the accident in question, in the exercise of ordinary care for his own safety. (Given.)

33. If you believe from a preponderance of the evidence, under the instructions of the court, that at the time of the accident and injury complained of by the plaintiff in this case, he was acting within the scope of his employment and that he was, then and there, engaged in performing a service for the defendant which was reasonably necessary in aid and furtherance of interstate commerce and so closely related thereto as to be substantially or practically a part of such commerce, then the plaintiff, at the said time and place, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. (Given.)

34. If you believe from the preponderance of the evidence under the instructions of the court, that the defendant was guilty of negligence, as charged in the plaintiff's declaration, and if you further believe from the evidence, under the instructions of the court, that the plaintiff was not guilty of any contributory negligence and that he did not assume the risk of injury at the time of the accident in question, and if [fol. 140] you further find from the evidence that the plaintiff has sustained damages by reason of physical pain and suffering undergone by him as a natural, direct and proximate result of negligence of the defendant, as charged in said declaration, then to enable the jury to estimate the amount of such damages so caused by physical pain and suffering, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jurors may make such estimate from the facts and circumstances proved by the evidence and by considering them in connection with their knowledge, observation and experience in the affairs of life. (Given.)

35. The court instructs the jury that if, from a preponderance of the evidence, under the instructions of the court, you find the defendant guilty of negligence, as charged in the plaintiff's declaration, and if you further believe from the evidence that the plaintiff was employed by and was at work for the defendant, at the time of the accident and injury complained of, in interstate commerce, and if

you further believe from the evidence and under the instructions of the court, that the plaintiff was not guilty of any contributory negligence and that he did not assume the risk of injury at the time and place in question, then in assessing the plaintiff's damages, if any, the jury should take into consideration whatever, if anything, the evidence may show as to the extent and nature of the injury, if any, suffered by him, if suffered by him as a direct result of the accident in question, so far as shown by the evidence; the pain and suffering, if any, which the jury may believe from the evidence the plaintiff has sustained, as a direct result [fol. 141] and consequence of the injury, if any; the duration of such injury, if any, and any permanent disability, if any, caused plaintiff as a direct result and consequence of such injury; also any loss of health or strength, if any, which the jury may believe from the evidence the plaintiff has sustained or will sustain as a direct result and consequence of such injury, if any; also the value of the plaintiff's time lost, if any, by reason of such injury and his inability, if any, to work and earn money in the future so far as any of the above mentioned elements of damage, if any, have been charged in the plaintiff's declaration and shown by a preponderance of the evidence; and thereupon the jury will determine from the evidence what sum will be a fair and just compensation for such injury, if they find a verdict for the plaintiff. (Given.)

To the giving of all, and to the giving of each, of said instructions, the defendant duly excepted.

And thereupon the court gave to the jury, on behalf and at the request of the defendant, the following instructions:

4. No juror should consent to a verdict which does not meet with the approval of his own judgment and conscience. (Given.)

5. You are instructed that the plaintiff must prove his case, as alleged in his declaration, by a preponderance or the greater weight of the evidence, and this rule applies to the question as to whether or not, at the time of his injury, plaintiff was engaged in interstate commerce. In other words, if you are uncertain whether the plaintiff has proved, by a preponderance of the evidence, that at the time of his injury he was engaged in interstate commerce, your ver-

dict must be in favor of the defendant and you should find the defendant not guilty. (Given.)

[fol. 142] 14. The plaintiff can recover in this particular case only under the terms of the Act of Congress known as the Federal Employers' Liability Act; and unless you find from a preponderance of the evidence that at the time of his injury he was then and there actually working in interstate commerce you should find the defendant not guilty; and the fact, if it be a fact, that plaintiff at some other time or place was actually engaged in interstate commerce is immaterial for the question you must decide is whether or not, at the time of his injury, plaintiff was doing work in commerce between the states. (Given.)

15. Commerce is movement and all of the employees of a railroad are more or less necessarily connected with or related to commerce and movement. However, not all of the employees of a railroad, notwithstanding their necessary connection with or relation to interstate commerce are, in doing their work, engaged in interstate commerce. It is only when such connection with or relation to interstate commerce is in the actual operation of the instrumentalities of interstate commerce that such employees can be said to be engaged in interstate commerce. So that, in this case, you should not find that the plaintiff, at the time of his injury, was engaged in interstate commerce unless he has proved by a preponderance of the evidence that his work was so closely related to interstate transportation itself—that is, the actual interstate operation of the instrumentalities of interstate commerce—that it was practically a part of such actual operation of such instrumentalities in interstate transportation. (Given.)

16. It is proved by the evidence in this case that at the [fol. 143] time of his injury plaintiff's employment in the service of the railroad was that of fireman of the heating plant located in the roundhouse here at Waukegan. During his employment in that capacity that heating plant consisted, so far as the generation of heat was concerned, sometimes of a stationary boiler and at other times of a switch engine which was substituted for the stationary boiler, and which switch engine is spoken of in the testimony and these instructions as the heater engine.

You are instructed that so far as the question of whether plaintiff was, at the time of his injury, engaged in interstate commerce is concerned, the boiler engine stood and stands precisely in the same position as the stationary boiler. The fact that one was a locomotive, having wheels and capable of being moved from place to place has no bearing whatever on the subject of interstate commerce. (Given.)

17. You are instructed that the test for determining whether at any given time, a railroad employee was engaged in interstate commerce is this: Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to interstate transportation as to be practically a part of interstate transportation. (Given.)

19. You are instructed that if you find from the evidence that plaintiff was doing the work in which he was engaged at the time of the accident merely as a volunteer, your verdict must be not guilty. (Given.)

20. If you find from the evidence that the movement of the engines, at the time of the accident, was started without the ringing of the bell on the engine that operated that movement, you cannot find that that act was negligence on the part of the defendant for the results of which it would [fol. 144] be liable to the plaintiff, unless you also find from a preponderance of the evidence that the other employees of the defendant, or some or one of them, knew, or in the exercise of ordinary care should have known, that such movement would result in injury to the plaintiff and had such knowledge or knew such fact for a long enough time ahead of the movement of the engines to have, in the exercise of ordinary care, taken some course that would have prevented such movement. (Given.)

22. In determining whether plaintiff was guilty of contributory negligence you must apply the same standard to his conduct as you apply to the conduct of the defendant Railway Company. (Given.)

23. If you believe from the evidence that the plaintiff was guilty of any want of due care which contributed in any degree to cause his injury, then the plaintiff is not entitled to recover full damages in this case. (Given.)

25. You are instructed that as a matter of law plaintiff's injury was not caused by actionable negligence of the defendant, unless plaintiff has proved by a preponderance of the evidence that the defendant, in the exercise of ordinary care, could have foreseen or reasonably anticipated that plaintiff, at the time of the movement of the engines in question, was or would be upon the tender of the heater engine, and that he would or had pulled down the coal slide from the chute, and that he would be or was standing in the space between such coal slide and the cab of the heater engine, and that if the engines should move plaintiff would be caught and injured between such coal slide and such engine cab.

Negligence is the basis, and the only basis, of liability under this Federal Act, and there can be no recovery in an [fol. 145] action brought under this Federal Act unless it shall appear from a preponderance of the evidence that negligence on the part of the defendant was the proximate cause of the injury. (Given.)

26. You are instructed that as a matter of law the mere facts that this accident happened and plaintiff sustained serious injury therein do not raise any question of liability on the part of the defendant for such injuries. If you find from the evidence that plaintiff's injury was the result of a pure accident that was not caused by any negligence either on his own part or on the part of the defendant, your verdict should be not guilty. (Given.)

27. The only duty owed by this Railway Company to give plaintiff instructions or warn him against dangers was in connection with the things the railroad company required plaintiff to do, or which were the duties of the plaintiff to do. An employer has no duty to instruct an employee as to what he shall not do or to warn him against the dangers of doing, or to instruct him how to do, a thing which he is not expected or required to do. (Given.)

28. The Railroad Company in this case was not bound to guard against any accidents or occurrences not reasonably to be anticipated by reasonable foresight, and it is not chargeable with negligence, for which plaintiff can recover damages, for any failure on its part to guard

[illegible]

against an accident or occurrence which was barely possible but not reasonably probable. (Given.)

29. If you find from the evidence that the defendant could not reasonably have anticipated that plaintiff would be in the place where he was at the time of the accident [fol. 146] your verdict should be not guilty. (Given.)

30. If you find from the evidence that the accident in question in this case could not reasonably have been anticipated or foreseen as the natural and probable result of any act or omission on the part of the defendant, your verdict must be not guilty.

In other words, if this particular accident was an extraordinary occurrence which the railroad company had no reason to anticipate, then the railroad company is not liable in damages for this plaintiff's injuries. (Given.)

31. You are instructed that as a matter of law plaintiff cannot recover damages in this case if it appears from the evidence that the sole cause of his injury was his own act, whether negligent or not. Unless you find from a preponderance of the evidence that negligence of the defendant was the proximate cause of plaintiff's injury plaintiff is not entitled to recover any damages in this case. (Given.)

32. If you should come to the assessment of damages in this case you can only allow plaintiff, on account of loss of earning power, the present cash value of such loss of earning power. (Given.)

33. If you find a verdict in favor of the plaintiff and that a want of due care on the part of the plaintiff contributed to cause his injury, in assessing his damages you should first find the total amount of the damages he has sustained and then the proportion which his negligence contributed to cause his injury, subtract such proportion from the whole and in your verdict assess only such an amount of damages as correctly represents the whole diminished by such proportion. (Given.)

Defendant's Requested Instructions to Jury

The defendant duly requested the court to give to the [fol. 147] jury, and furnished in writing to the court for that purpose, the following instructions, but which the court refused to give:

5. If you believe from the evidence that plaintiff, by the exercise of ordinary care, could have avoided being injured, then you should find that he was guilty of contributory negligence. (Refused.)

6. Unless, at the time of his injury, plaintiff was doing work that was actually in interstate commerce it was not the intention of Congress, as expressed in this Federal Act, to give him a cause of action by or under the act, nor, on the other hand, to deprive him of any damages, or right to damages, which he has or may have under the laws of the State of Illinois, or under any other law.

In arriving at a finding as to whether plaintiff has proved, by a preponderance of the evidence, that at the time of his injury he was doing work in interstate commerce, you should not consider what the effect of your finding on that question will be as to either the plaintiff or the defendant.

You must not be concerned, or allow yourselves to become concerned, in passing upon the question of whether or not plaintiff was engaged in interstate commerce, with what effect your finding in that regard may have on any other question involved in the case, such as negligence of the defendant, contributory negligence of the plaintiff, or whether the plaintiff has suffered damages, if any, or the nature or extent of his injury.

In other words, the first question for you to determine in this case is whether the plaintiff, at the time of his injury, was doing work in commerce between the states; and if you find that he was not, that is the end of this particular case, and your verdict must be not guilty.

(Fol. [illegible]) A verdict of not guilty in this particular case will not and does not mean that plaintiff is not entitled to be paid for his injuries in or by some other action or proceeding before this or another court or duly appropriate tribunal. (Refused.)

7. In cases brought to recover damages under the Federal Employers' Liability Act it is the presumption that plaintiff was not engaged in interstate commerce at the time of his injury. The plaintiff must overcome that presumption by a preponderance of evidence that at the time of his

injury both he and the defendant were engaged in interstate commerce in the particular work that plaintiff was then and there doing at the time of his injury.

Unless, therefore, plaintiff has satisfied you by a preponderance of the evidence that he was engaged in interstate commerce at the time of his injury, the presumption that he was not engaged in such interstate commerce still stands and you must find the defendant not guilty. (Refused.)

8. If a want of ordinary care on plaintiff's own part contributed to cause his injury this Federal Act requires the jury to diminish his damages in proportion to the amount that his negligence contributed to his injury. In other words, contributory negligence of the plaintiff under this Federal Act is not a complete bar to all damages, but it must reduce plaintiff's damages in the proportion that his negligence bears to the combined negligence of himself and the defendant. For example, if the defendant was guilty of 25 per cent and the plaintiff was guilty of 75 per cent of all the negligence which caused the injury, then the whole damages that the plaintiff has sustained must be reduced 75 per cent and he can recover only 25 per cent of the whole damages he has sustained. The ob- [fol. 140] ject and intent of the contributory negligence provision of this Federal Act is that an injured employee shall recover only for that portion of the damages caused by the negligence of the defendant. He cannot recover anything or any sum for the proportion of the whole which his own negligence contributed to his whole damages. (Refused.)

9. If you should find a verdict in favor of the plaintiff you must not, in assessing his damages, arrive at the amount thereof by what is known as a quotient verdict. A quotient verdict is one that is made up by each of the jurors naming an amount of damages, then adding such amounts together and dividing the sum by twelve. Such a verdict is highly improper, wholly unlawful, and you must not assess damages, if you assess any, by that method or in that or any similar way. (Refused.)

10. In order to recover damages under the provisions of this Federal Employers' Liability Act, plaintiff must prove

by a preponderance of the evidence that his injury was the natural and probable consequence of the alleged negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

In determining whether such injury was the natural and probable consequence of the alleged negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances, you should consider that the defendant is only bound to guard against those occurrences which can reasonably be anticipated by reasonable foresight.

If men or railroads went about to guard themselves against every risk to their employees which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man or rail- [fol. 180] road, then, to whose reasonable behavior you are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. They will order their precaution by the measure of what reasonably appears likely in the known course of things. (Refused.)

11. If you find from the evidence that the ringing of the bell on the second engine from the south would not have prevented the plaintiff's injury, your verdict must be not guilty. (Refused.)

12. You are instructed that there is not sufficient evidence in this case to justify you in finding that, so far as the plaintiff was concerned, there was any duty on the part of the defendant to ring the bell on the second engine from the south before starting the movement of the engines in which plaintiff was injured. (Refused.)

13. You are instructed that there is no evidence in this case that will justify you in finding that plaintiff's perilous position on top of the tender of the header engine between the coal chute and the cab of such engine was discovered by the other employees of the Railway Company a long enough time before the happening of the accident so that they could have, in the exercise of ordinary care, prevented the movement of the engines and the consequent happening of the accident. (Refused.)

14. Even if you should find that the plaintiff has proved by a preponderance of the evidence that the Railroad Company was negligent, and that such negligence caused or contributed to cause plaintiff's injuries, yet your verdict must be in favor of the defendant if you also find from the evidence [fol. 151] that the Railroad Company could not have foreseen or reasonably anticipated plaintiff's injury as the probable result of such negligent act or omission. (Refused.)

15. You are instructed that as a matter of law if you find from the evidence that plaintiff's work did not require him to be at the place where he was when he was injured, and that the Railway Company had no knowledge of his presence at such place, at least for a long enough time to take some action to prevent the accident after discovering him in such position, plaintiff is not entitled to recover damages in this case and your verdict must be for the defendant. (Refused.)

16. This Railway Company did not owe plaintiff any duty to protect him from dangers in connection with the place where he was, or with the thing he was doing at the time of the accident unless plaintiff's work required him to be in such place. (Refused.)

17. You are instructed that there is no evidence in this case sufficient to justify you in finding that there was any duty on the part of any of the other employees of the defendant present at the place of this accident to keep a lookout for the plaintiff for the purpose of discovering whether or not he had placed himself in a position of danger. (Refused.)

18. It is proved by the evidence in this case that plaintiff's work did not require him to be at the place where he was when he was injured, and you are therefore instructed to return a verdict of not guilty in favor of the defendant Railway Company. (Refused.)

19. While the law permits a plaintiff to testify in his own [fol. 152] behalf and for near relatives such as brothers to so testify, nevertheless, the jury have the right in weighing the testimony of the plaintiff and his relatives to determine how much credence is to be given it and to take into

[illegible] the fact that the one is the plaintiff and that the other is a [illegible], together with their interest in the result of the suit. (Refused.)

[illegible] Movement of the four engines coupled together from the [illegible] in Waukegan to the coal chutes at Beach was not a movement in interstate transportation. (Refused.)

[illegible] If you find from the evidence that at the time of his injury plaintiff was not engaged in interstate commerce, your [illegible] be in favor of the defendant, the Chicago and North Western Railway Company, that it is not guilty. Such finding and verdict will mean that plaintiff cannot recover damages under the Federal Act, and will not preclude or prevent him from obtaining damages or compensation under other applicable law, if any, nor will it have the effect of depriving him of any right whatever under any law of this State or of the nation.

Such finding and verdict will mean simply that so far as this particular suit is concerned it was brought under the wrong law. (Refused.)

[illegible] You are instructed that as a matter of law the coupling of the lead engine to the other three engines did not change the character of plaintiff's work, nor make what would otherwise have been work outside of interstate commerce work in that commerce. This, because it is the work that plaintiff himself was doing at the time of his injury and not the work [illegible] of anybody else or any other employee of the defendant that must be considered by the jury in determining whether, at the time of his injury, he was engaged in interstate commerce work. (Refused.)

[illegible] You are instructed that as a matter of law the plaintiff was not, at the time of his injury, engaged in interstate [illegible]. (Refused.)

[illegible] You are instructed that, as a matter of law, taking [illegible] of the [illegible] engine from the coal [illegible] did not constitute and was not work in [illegible] within the meaning of the Federal [illegible] Act. (Refused.)

[illegible] You are instructed that there is no evidence in the [illegible] which would justify you in finding that plaintiff, at the time of his injury, was engaged in interstate commerce because of the fact that the boiler engine of which he was the fireman was coupled to engines which were to be or were being coaled [illegible] later engaging in interstate transportation. The physical connection of the four engines has no bearing on the nature of plaintiff's work as to whether or not it was interstate. It is the work plaintiff himself was doing at the time of his injury that determines the character of his work, whether interstate or not, at that time. (Refused.)

26. You are instructed that the fact, if you find it to be a fact, that the three engines to which the boiler engine was coupled, or any one or more of them, were, at the time of this accident, being coaled up for thereafter engaging in interstate commerce has no bearing on the question as to [fol. 156] whether, at the time of his injury, plaintiff was engaged in interstate commerce. (Refused.)

27. You are instructed that there is no evidence in this case from which you will be justified in finding that plaintiff, at the time of his injury, was engaged in interstate commerce because of the fact that the boiler engine of which he was the fireman heated any passenger coaches used for the transportation of passengers between stations in Illinois, which coaches seem to be commonly known as suburban coaches, and trains of which are commonly known as suburban trains. (Refused.)

28. You are instructed that there is no evidence in this case from which you will be justified in finding that plaintiff, at the time of his injury, was engaged in interstate commerce because of the fact that the boiler engine of which he was the fireman heated any buildings or dismantled box cars. (Refused.)

29. It is the law that in actions brought to recover damages for personal injuries under the Federal Employers' Liability Act, of which this case is one, an employee of an interstate railroad, such as the defendant in this case, being engaged in interstate commerce, and entitled to recover damages under the Federal Act, when and while he is engaged in going for or obtaining coal for a heating plant [illegible] going or coming such a place, the purpose of [illegible]

7

which is to warm buildings in which other employees are engaged in interstate commerce. Whatever may be the work of other employees of the company in such buildings is not material and should not be considered in arriving at your finding as to whether plaintiff, at the time of his injury, [fol. 133] was or was not engaged in interstate commerce. (Refused.)

30. By a preponderance of the evidence is meant the greater weight of the evidence. If the evidence is evenly balanced, then plaintiff has failed to prove his case by a preponderance of the evidence, and your verdict should be not guilty. (Refused.)

31. It appears from the evidence in this case, as a matter of law, that a failure to exercise ordinary care on the part of the plaintiff contributed proximately to cause his injury, and therefore, if you should come to a consideration of assessment of damages in favor of the plaintiff you will find the proportion that such negligence of the plaintiff bears to the whole negligence causing his injury, and diminish his damages accordingly. (Refused.)

The court refused to give the instructions last above, or any of them, to which refusal to give either or any and each of said requested instructions the defendant duly excepted.
Jury retires.

VERDICT

Jury returns verdict, finding the defendant guilty and assessing the plaintiff's damages at the sum of $37,500.

MINUTE ENTRIES

Verdict received and jury discharged.

Then and thereupon defendant moved the court to set aside said verdict and to grant and order a new trial of said cause.

Defendant's written grounds or points submitted and filed in support of its motion for a new trial.

Thereafter, and on May [illegible], [illegible], a day of said term, the court denied defendant's motion for a new trial, to which [fol. 136] denial and ruling defendant duly excepted.

Defendant moves the court in arrest of judgment; motion denied; exception by defendant.

JUDGMENT

The court gave judgment on the verdict of the jury, in favor of the plaintiff and against the defendant, in the sum of $37,500, with costs. To which ruling and action of the court defendant duly excepted.

ORDER ALLOWING APPEAL

Defendant prayed appeal to the Appellate Court of Illinois, Second District; which appeal was allowed on condition that defendant file bond in the sum of $42,000 within thirty days; ninety days allowed for bill of exceptions.

ASSIGNMENTS OF ERROR

Comes now the appellant, Chicago and North Western Railway Company, by [illegible] J. Wilcox and L. C. [illegible], its attorneys, and shows to the court that there is manifest error in the record and proceedings and in the rendition of judgment of the Circuit Court of Lake County in said cause, which is apparent on the face of the record therein in this, to wit:

1. The court erred in denying the defendant's motion made at the close of plaintiff's case to instruct the jury to find the defendant not guilty.

2. The court erred in refusing to give to the jury at the close of the plaintiff's case the instruction requested by the defendant to find the defendant not guilty.

3. The court erred in denying the defendant's motion [fol. 137] made at the close of all the evidence in the case to instruct the jury to find the defendant not guilty.

4. The court erred in refusing to give to the jury at the close of all the evidence in the case, the instruction requested by the defendant to find the defendant not guilty.

5. The verdict and judgment are against the manifest weight of the evidence.

6. The verdict and judgment are not supported by the evidence, nor by sufficient evidence.

7. The verdict and judgment are grossly excessive and manifestly the result of passion or prejudice on the part of the jury returning the same.

8. The verdict and judgment are against the clear weight and preponderance of the evidence.

9. The verdict and judgment are contrary to the instructions given by the court.

10. The court erred in refusing to admit proper, competent and relevant testimony offered on behalf of the defendant.

11. The court erred in refusing to permit proper questions to be asked of witnesses on the trial, and in refusing to permit answers to proper questions, to the prejudice of the defendant.

12. The court erred in admitting, over the objections of the defendant, improper, incompetent, irrelevant and immaterial testimony on behalf of the plaintiff.

13. The court erred in refusing to exclude and strike out, on motion of the defendant, improper, incompetent, irrelevant and immaterial evidence.

14. The court erred in refusing and striking out, on motion [fol. [illegible]] tion of the plaintiff, proper evidence offered on behalf of the defendant.

15. The court erred in putting and admitting improper questions to be put to witnesses, to the prejudice of the defendant, on the trial.

16. The court erred in excluding proper evidence offered by the defendant.

17. The court erred in admitting improper, incompetent, irrelevant and immaterial evidence offered by the plaintiff.

18. Counsel for the plaintiff asked improper questions on the trial, to the prejudice of the defendant.

19. The Court erred in admitting, over defendant's objection, the facts recited in the stipulation of the parties with reference to the uses and locations, before, at the time of and after the accident, of the three engines to which the heater engine was coupled.

20. The court erred in refusing to give proper instructions asked by the defendant.

21. The court erred in refusing to give, on behalf of the defendant, each and every instruction asked by the defendant and refused by the court.

22. The court erred in giving each and every instruction given at the request of the plaintiff.

23. The verdict is contrary to the act of the Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and the verdict and judgment are in contravention of the rights of the defendant under said act, because the evidence received on the trial of the above entitled cause shows no negligence on the part of the defendant.

[fol. 159] 24. The verdict is contrary to the act of the Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and the verdict and judgment are in contravention of the rights of the defendant under said act, because the evidence received on the trial of the above entitled cause fails to show that the act in which plaintiff was engaged at the time of the accident, which resulted in his injury, was any part of the duty of his employment for the defendant.

25. The verdict is contrary to the act of the Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and the verdict and judgment are in contravention of the rights of the defendant under said act, because the evidence received on the trial of the above entitled cause shows that the act in which plaintiff was engaged at the time of said accident was [illegible] outside of the course of his employment for the defendant.

16. The verdict and judgment are contrary to the act of Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and are in contravention of the rights of the defendant under said act, because the evidence received on the trial of said cause fails to show that the defendant at the time of said accident, so far as the work in which plaintiff was engaged was concerned, was engaged in interstate commerce.

17. The verdict is contrary to the act of the Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and the verdict and judgment are in contravention of the rights of the defendant under said act, because the evidence received on the trial [fol. 160] of said cause fails to show that the plaintiff at the time of said accident was engaged in interstate commerce.

18. The verdict is contrary to the act of the Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and the verdict and judgment are in contravention of the rights of the defendant under said act, because the manifest weight of the evidence received on the trial of said cause shows that plaintiff at the time of the said accident was performing an act which was not a part of interstate commerce.

19. The verdict and judgment are contrary to the act of the Congress of the United States known as the Federal Employers' Liability Act of 1908, as amended, and are in contravention of the rights of the defendant under said act, because the evidence received on the trial of said cause shows that plaintiff at and immediately prior to the happening of the accident in question failed to exercise ordinary care for his own safety and under said act (even if negligence [illegible] jury should have diminished the full damages [illegible] the amount of the verdict is so excessive [illegible] the failure of the jury to make [illegible] damages on account of contributory negligence [illegible].

20. [illegible] shows that as a matter of law and fact [illegible] the risks and dangers present at [illegible] preceding the injury.

[illegible]. The court erred in admitting in evidence over defendant's objection certain rules of the defendant company.

[illegible]. Misconduct of plaintiff's counsel in argument to the jury.

Nelson J. Wilson, J. C. [illegible], Attorneys for Defendant.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the seventh day of May, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois.

Present: The Hon. Franklin H. Boggs, Presiding Justice; Hon. Thomas M. Jett, Justice; Hon. Norman L. Jones, Clerk; Justus L. Johnson, Clerk; Floyd S. Clark, Sheriff.

Be it remembered that, to-wit, on the 16th day of September, A. D., 1929, certain proceedings were had, and orders made and entered of record by said Court, among which is the following, viz:

8145

EUGENE ROLLE, Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant.

Appeal from the Circuit Court of Lake County

Now on this day comes the appellee and moves the court for an extension of time in which to file brief and argument herein. And the court having duly considered said motion and being now fully advised in the premises, it is therefore ordered by the court that time to file brief and argument of appellee be and the same is hereby extended thirty days.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the first day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois.

Present: The Hon. Franklin H. Boggs, Presiding Justice; Hon. Thomas M. Jett, Justice; Hon. Norman L. Jones, Justice; Justus L. Johnson, Clerk; Floyd S. Clark, Sheriff.

Be it remembered that, to-wit, on the 1st day of October, A. D., 1929, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

8160

Eugene Dolan, Appellee,

vs.

Chicago and North Western Railway Company, Appellant

Appeal from the Circuit Court of Lake County

Now on this day comes the appellee and moves the court for leave to withdraw the record filed herein for the purpose of making and preparing additional abstracts thereof. And the court having duly considered said motion and being now fully advised in the premises; It is therefore ordered by the court that leave be and the same is hereby granted appellee to withdraw the record filed herein for a period of twenty days.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the fourth day of February, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois.

Present: The Hon. Franklin H. Boggs, Presiding Justice; Hon. Thomas M. Jett, Justice; Hon. Norman L. Jones, Justice; Justus L. Johnson, Clerk; Floyd E. Clark, Sheriff.

Be it remembered that, to-wit, on the 4th day of February A. D. 1930, certain proceedings were had, and orders made and entered of record by said Court, among which is the following, viz:

8160

Eugene Dolan, Appellee,

vs.

Chicago and North Western Railway Company, Appellant

Appeal from the Circuit Court of Lake County

Now on this day this cause coming on for hearing in the [illegible], and it appearing to the Court that a duly certified Transcript of the [illegible] of the Court below, together [illegible] thereof; and Briefs and Arguments [illegible] of the errors assigned herein, have [illegible] quired by law, and the rules of this Court [illegible] made and provided, and that this cause [illegible] by Nelson J. Wilcox for appellant and [illegible] for appellee, is here submitted upon said Transcript, Abstracts, Briefs and Arguments, for the consideration and judgment of the Court,

Therefore, it is ordered by the Court that this cause be, and the same is hereby taken under advisement;

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the sixth day of May, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois.

Present: The Hon. Franklin H. Boggs, Presiding Justice; Hon. Thomas M. Jett, Justice; Hon. Norman L. Jones, Justice; Justus L. Johnson, Clerk; [illegible], Sheriff.

Be it remembered that, to-wit, on the [illegible] day of May, A. D., 1930, certain proceedings were had, and orders made and entered of record by said Court, among which is the following, viz:

8146

Eugene Bolas, Appellee,

vs.

Chicago and Northwestern Railway Company, Appellant

Appeal from Circuit Court of Lake County

On this day came again the said parties, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, [illegible] the record and proceedings aforesaid, [illegible] the judgment aforesaid [illegible] vicious or defective, and that in said record there is no error.

Therefore, it is considered by the Court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant, his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the sixth day of May, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois:

Present: The Hon. Thomas M. Jett, Presiding Justice; Hon. Norman L. Jones, Justice; Hon. Franklin H. Boggs, Justice; Justus L. Johnson, Clerk; Floyd S. Clark, Sheriff.

Be it remembered that, to-wit, on the 23d day of September, A. D., 1930, certain proceedings were had, and orders made and entered of record by said Court, among which is the following, viz:

8145

EUGENE BOLLE, Appellee,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Appellant

Appeal from Circuit Court of Lake County

Now on this day this cause coming on to be heard upon the petition of appellant for a rehearing herein, and the court having duly considered said petition, as well as the matters and things alleged in support thereof and being now fully advised of and concerning the premises; It is therefore ordered by the court that the modified opinion of this court be and the same is filed in lieu of the original opinion heretofore filed herein, and said original opinion is hereby stricken from the files herein. And it is further ordered by the court that said petition for a rehearing be and the same is hereby overruled and denied, and that said petitioner pay the costs and charges herein taxed.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the sixth day of May, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois.

Present: The Hon. Thomas M. Jett, Presiding Justice; Hon. Norman L. Jones, Justice; Hon. Franklin H. Boggs, Justice; Justus L. Johnson, Clerk; Floyd S. Clark, Sheriff.

Be it remembered that afterwards, to-wit, on [illegible], 1930, the modified opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8145

Eugene Bolle, Appellee,

v.

Chicago & Northwestern Railway Company, Appellant.

Mr. Presiding Justice Boggs delivered the opinion of the court.

Appellee instituted an action on the case in the circuit court of Lake county against appellant, to recover damages under the federal Employer's Liability Act for an injury alleged to have been sustained by him.

The declaration consisted of three original and one additional count. The third original count seems to have been withdrawn. The first count, among other things, charges that appellant and appellee were both engaged in interstate commerce; that appellee had been hired to work as a fireman of a stationary boiler used to heat the passenger depot and certain other buildings; that on December 4, 1926, the boiler was out of repair and a locomotive was substituted, which appellee fired, and was ordered to accompany such locomotive to [illegible] where it would be supplied with coal and water; that it was coupled to three other engines, in which were experienced employees; that appellee accompanied said engine to Lynch and fired the same en route; that after the arrival at Lynch, appellee got on the tender of the helper engine and adjusted the coal slide for the purpose of filling the tender with coal; that while coal was being emptied into the tender "he was in an obviously dangerous and exposed position in the event that the engines should be moved, to the knowledge of the other employees, who, disregarding their duty, negligently and without notice or warning to plaintiff, moved the engines with a sudden and violent jerk, and plaintiff was caught and crushed between the coal slide and the cab of the engine."

The second count charges among other things that, while standing on the tender of said engine and in an obviously dangerous position, which was known or could have been known to the other employees of appellant, said engine was moved without ringing any bell, contrary to the rules of appellant. The additional count charges that appellee, in the due course of his employment, got on the tender and took coal and water, and, while doing so, appellant negligently and without notice or warning moved the engine with a sudden jerk and appellee was caught and crushed, etc.

To said declaration appellant filed a plea of the general issue, with notice of the special defenses of contributory negligence and assumed risk on the part of appellee.

A judgment for $[illegible] was recovered and, on appeal to this court, said judgment was reversed and the cause was ordered remanded. Thereupon appellee filed an affidavit to the effect that, upon another trial, he could offer no additional evidence to support his contention that he was engaged in interstate employment, and on his motion the remanding order was stricken. (Bolle v. Chicago & N. W. Ry. Co., [illegible] Ill. App. [illegible].)

The Supreme Court reversed and remanded the cause with directions that this court either affirm the judgment or reverse it and remand the cause. (Bolle v. Chicago & N. W. Ry. Co., [illegible] Ill. [illegible].) Thereupon an order was entered remanding the cause. (Bolle v. Chicago & N. W. Ry. Co., [illegible] Ill. App. [illegible].) On the second trial, the evidence was excluded and a verdict was directed in favor of appellant. On appeal to this court, we held that the court erred in directing a verdict, and reversed and remanded the cause (Bolle v. Chicago & N. W. Ry. Co., [illegible] Ill. App. [illegible]). The cause was again tried, resulting in a verdict and judgment in favor of appellee for $[illegible]. To reverse said judgment appellant prosecutes this appeal.

It is first contended that the court erred in refusing to direct a verdict in favor of appellant, on motions made at the close of appellee's evidence and again at the close of all the evidence, for the reasons: First, that there is no evidence in the record fairly tending to prove that at the time of appellee's injury he was engaged in interstate commerce; second, that the evidence in the record does not fairly tend to support the allegation of negligence on the part of appellant.

Counsel for appellant while conceding in effect that the Supreme Court and this court have heretofore passed on the first proposition adversely to it, contend that such holding is not supported by the authorities and insist that the question of whether an employee is engaged in interstate commerce, is one of law for the court. It has frequently been held that such question may become one of fact, for the determination of a jury. Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146-152; North Carolina R. Co. v. Zachary, 232 U. S. 248; Southern Ry. Co. v. Lloyd, 239 U. S. [illegible]; Pennsylvania Co. v. Donat, 239 U. S. 50-52. As to the first proposition, the court did not err in its ruling.

On the question of negligence, appellant's motion to direct a verdict at the close of all the evidence raised the legal question as to whether there is any evidence in the record which, with its reasonable intendments and inferences, fairly tends to prove the averments of the declaration. Chicago City Ry. Co. v. Martensen, 198 Ill. 511-513; Chicago City R. Co. v. Loomis, 201 Ill. 118-119; [illegible] v. [illegible] Ry. Co., 271 Ill. 184-186; Peters v. Chicago Rys. Co., [illegible] Ill. [illegible]. So tested, we hold that the court did not err in its ruling.

It is also insisted that, even though it be held that the question as to whether appellee was engaged in interstate commerce was one of fact, the finding of the jury that he was so engaged is against the manifest weight of the evidence. The employment and duties of appellee prior to and at the time of his injury are so fully and clearly set forth in the opinion of the Supreme Court that we here adopt the same:

"On November 10, 1930, plaintiff was employed by defendant in Waukegan. His duties consisted of watching engines in the roundhouse, sanding them, turning turntables, and other duties in the roundhouse with reference to engines engaged in both interstate and intrastate commerce. He also fired the stationary boiler, or the locomotive engine which was substituted when the boiler was out of service, which supplied heat to the defendant's passenger depot, baggage room in depot, coach yard pipes, roundhouse foreman's office, engineers' and firemen's register and locker room, engineers' and firemen's bunkhouse, bridge and building maintenance bunk-car, bridge and building carpenter foreman's office and shop, and signalmen's maintenance-of-way car. The bridge and building car was used as living quarters by employees of defendant who were engaged in the service of repairing bridges and buildings. The heating plant in question which heated this bridge and building car also conveyed heat or steam through the yard pipes which were used to heat passenger coaches. These yard pipes could be used to heat the cars in any train if necessity required it. The signal maintenance-of-way car was used by the signalmen for keeping their supplies used in the maintenance-of-way department. These latter employees were engaged in taking care of all signaling devices in their territory. Whenever it got cold at night heat was supplied to these men where they were kept and housed. On December 4, 1932, this stationary boiler was temporarily out of repair and plaintiff was firing the locomotive engine which supplied heat to the various buildings. He went to work about four o'clock in the afternoon and about nine o'clock in the evening he was directed to accompany his engine to [illegible], in defendant's yards, about four miles north of Waukegan station, for coal and water. The engine and tender were thereupon attached to three other engines which had been engaged in interstate commerce and were then being prepared for interstate trips, and the four engines, being so coupled together, were propelled northward by the [illegible] engine, which was immediately north of the engine upon which plaintiff was riding. The four engines so coupled together arrived at [illegible] and the engine of plaintiff took water, but before the tank was completely filled the engines were moved north of a [illegible] in order to permit an interstate train to pass. The engines remained on the sidetrack only a few minutes, and then started back to the water tank and coal chutes, the motive power at that time being furnished by the most southerly engine. The engines stopped and the engine farthest south was supplied with coal. Again the four engines moved southward, the most southerly engine furnishing the power, and the second engine toward the south, and also the third one, upon which was plaintiff, were placed opposite the coal chutes. While engaged in taking coal the engine immediately north of plaintiff without notice or warning moved northward suddenly and plaintiff's leg was caught between the cab of his engine and the coal chute, and as a result it became necessary to amputate his right leg above the knee." Bolle v. Chicago & N. W. Ry. Co., supra, [illegible].

It is not contended by counsel for appellant that the facts are not as above stated, but that, on the facts the finding that appellee was engaged in interstate commerce is not warranted by the evidence.

Where reasonable minds would draw different inferences from circumstances shown without contradiction, a question for the jury is raised. Bolle v. Chicago & N. W. Ry. Co., 324 Ill. supra, 482; Brown v. Illinois Terminal Co., [illegible] Ill. 326; Frank v. Hoskins Co., [illegible] Ill. 46-47. In Bolle v. Chicago & N. W. Ry. Co., supra, the court at page [illegible] says:

"Whenever an issue is made in a case, and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts, but ultimate facts, even though there be no conflict in the testimony, or the evidence may be agreed upon or embodied in a stipulation of fact." Citing Chicago Title & Trust Co. v. Ward, 319 Ill. 201; Frank v. Hoskins Co., [illegible] Ill. 46.

The question then for our determination is as to whether the finding of the jury on the facts stated is against the manifest weight of the evidence. The Supreme Court held that this was a question of fact, to be determined by the jury, and said (p. [illegible]):

"The evidence in the case was not such that all reasonable minds must necessarily agree that at the time of the accident plaintiff's employment was not such as to bring him within the provisions of the Federal Employers' Liability Act."

It will be observed that appellee's general duties consisted of "watching engines in the roundhouse with reference to engines engaged in both interstate and intrastate commerce. He also fired the stationary boiler or the locomotive engine which was substituted when the boiler was out of service, which supplied heat to defendant's passenger depot, baggage room in the depot, coach yard pipes, roundhouse foreman's office, engineers' and firemen's register and locker rooms, etc."

While ordinarily the stationary engine was used in such heating operations, it frequently happened that a locomotive engine was used instead thereof. Such engine was being used on the day appellee was injured, and he had been ordered by Terasky, whom the evidence shows he was directed to take orders from, to accompany said engine to Beach for the purpose of supplying the same with coal and water. It was on this trip that he received his injuries. Appellee was then engaged in a work so closely connected with his duties in operating said heating plant as to be a part of the same. In Chicago & Alton R. Co. v. Industrial Commission, 288 Ill. 603, the court at page 611 says:

"A railroad servant killed by a passing train while shoveling snow on a railroad company's premises between a platform and the tracks, used indiscriminately for interstate and intrastate commerce, was then employed in interstate commerce. (New York Central Railroad Co. v. Porter, 39 Sup. Ct. 188.)"

In Dickinson v. Illinois Industrial Board, 280 Ill. 342, the court at page 344 says:

"If his (the employee's) work constitutes a real and substantial part of the interstate commerce which the carrier is engaged in, the employee is engaged in interstate commerce; otherwise not. (Illinois Cent. R. Co. v. Behrens, 233 U. S. 473; Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146; Chicago, R. I. & P. Ry. Co. v. Industrial Board, 273 Ill.

996.) His employment need not be directly in the transportation of goods from one State into another or in the operation or movement of trains. If he is engaged in the construction, maintenance or repair of any of the instrumentalities used by the carrier in the transportation of goods from one State into another he is engaged in interstate commerce. Section men repairing a track, carpenters repairing a bridge, machinists and car repairers working on engines and cars, and hostlers caring for engines, are engaged in interstate commerce if the track, bridge, engines and cars are used in interstate commerce. Their work has a direct and substantial connection with interstate transportation and is an essential part of it."

In Pedersen v. Delaware, L. & W. R. R. Co., *supra*, the court at page 152 says:

"The point is made that the plaintiff was not at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

In view of the foregoing authorities, we hold that the verdict of the jury finding that appellee was engaged in interstate commerce at the time of his injury, was supported by the evidence.

It is also insisted that the verdict finding appellant guilty of negligence is against the manifest weight of the evidence.

Appellee, according to his testimony, had been ordered dered by Tersky to accompany the engine used in the hauling operations to Beach for the purpose of supplying the same with coal and water; that he did so, and on arriving at the water tank, "Tersky hollered at me to get up and take water. * * * In response to that direction I got up and took water"; that while so engaged he was directed by McManaman, who is shown to have been in charge of the trip, to throw the spout aside, as the engines had to be moved to a siding to let a train through; that the engines were then moved to the coal chute; that he was watching the engine to the south of him and saw a man on that engine let down the chute; that thereupon he lowered the chute for the purpose of coaling his engine and, without the ringing of a bell or other warning to him, said engines were moved and he was caught and crushed between said chute and the cab of his engine.

While the men in charge of the other engines all testified that they did not see appellee at the time in question, McManaman testified:

"Just before the accident happened, the coal chute man let some coal down to the second engine from the south; then he released the slide and it went up. Then I discovered that there was a man up on top of the third engine from the south. After the coal chute man put up his slide, I heard him tell the operator of the engine Kucera was on, the second engine from the south, to back up. I know he (the man on the third engine) was up there because he had the coal chute down. * * * I had time, after I discovered him there and after his order was given, to do something. I did not do anything. I didn't think they would do anything while that man was there."

Appellee, according to his testimony, had been ordered on his engine for the purpose of watering the same. McManaman knew that appellee had been on said engine, as he had ordered him to throw aside the spout when the engines were being moved to the siding. The foregoing facts, in connection with the known inexperience of appellee, warranted the jury in finding that appellant was negligence in the operation of said engines, and that such negligence was the proximate cause of appellee's injury.

It may also be observed that it has frequently been held that, where on practically the same facts two juries have returned similar verdicts, which have been approved by the trial judge, courts of review will be extremely reluctant to interfere with the same. Wood v. Hildreth, 73 Ill. 52[illegible]; [illegible] v. [illegible], 97 Ill. 368-370; Upthegrove v. Chicago G. W. [illegible], 160 Ill. App. 89-91; Gill v. Gill, 197 Ill. App. [illegible].

It is the contention of appellant that because the [illegible] of coaling said engines was controlled by the [illegible] of the chute, appellant was not liable for such negligence. What we have already said sufficiently disposes of this contention.

It is also insisted by appellant that appellee assumed the risk of his employment, and that by reason thereof he cannot recover. The defense of assumed risk is an affirmative defense, and the burden of proving such defense was on appellant. Seaboard Air Line Railway v. [illegible], [illegible] U. S. 4[illegible]; Central Vermont Ry. Co. v. White, [illegible] U. S. 507; Fisher v. Chicago, R. I. & P. R. Co., [illegible] Ill. [illegible]. The testimony on the part of appellee is to the effect that no warning, by the ringing of a bell or otherwise, was given prior to the movement of the engine which resulted in his injury. The evidence on the part of appellant was to the effect that the bell was rung. It was therefore a question for the jury as to whether said bell was rung or other warning given. If no warning was given, the jury were warranted in finding that appellant was negligent as charged.

Appellee was inexperienced, and that fact was known to his foreman, who had given him orders to accompany the engine for the taking of coal and water. The evidence also warranted the jury in finding that appellee's position on said engine, just prior to its being moved, was known, or by the exercise of ordinary care, would have been known to those in charge.

In Walswila v. Illinois Cent. R. Co., 220 Ill. App. [illegible], the court at page 118 said:

"The important questions of fact as to the existence of a custom to ring the bell of an engine before starting, and the violation of this custom upon the particular occasion in question, were properly submitted to the jury. * * * Failure of the master to give the customary warning to his servant when in a position of danger is negligence. Sturm v. Consolidated Coal Co., [illegible] Ill. [illegible]; [illegible] v. Peoria & P. Union Ry. Co., [illegible] Ill. App. [illegible]; Chicago, R. I. & P. Ry. Co. v. [illegible], [illegible] Ill. [illegible]; Pennsylvania Co. v. Stoelke, 104 Ill. [illegible]. Failure to give warning under somewhat similar circumstances has been held to be neg-

[illegible] the Federal Employers' Liability Act. Gen- [illegible] v. Commerford, 218 Fed. 901; [illegible] R. R. Co. 184 Mich. [illegible]; [illegible] R. R. Co. [illegible] Minn. [illegible]. * * *

We cannot assent to the contention that [illegible] assumed the risk. It is undoubtedly true that work of this kind is dangerous and that he assumed the risk of the dangers ordinarily incident to this kind of work (Boldt v. Pennsylvania R. Co. 245 U. S. 441, 18 N. C. C. A. 401), but he did not assume the risk of an unexpected negligent departure from the ordinary method of doing this dangerous work. The correct distinction is stated in Chesapeake & O. Ry. Co. v. Proffitt, 241 U. S. 462, as follows: 'If [illegible] knew and assumed the risks of an ordinarily dangerous method of doing the work, he did not thereby assume the risk attributable not to the method but to negligence in pursuing it.'

To the same effect are Devine v. Chicago, R. I. & P. Ry. Co. 266 Ill. 248, affirmed in 239 U. S. 52; Lamoutte v. [illegible] Ry. Co. 140 Minn. [illegible]; Kenney v. Seaboard Air Line Ry. Co. 167 N. C. 14, affirmed in 240 U. S. 489; Chesapeake & O. Ry. Co. v. De Atley, 241 U. S. 310; [illegible] v. Chicago, I. & L. Ry. Co. 216 Ill. App. 74. They were cases under the Federal Employers' Liability Act."

Appellant's Rule 15 provided:

"The engine bell must be rung when the engine is about to move, and while approaching and passing public crossings at grade."

Under the foregoing authorities, the jury were warranted in finding against appellant under its plea of assumed risk.

It is also insisted that appellee was negligent, and that his negligence was the sole cause of his injury. Even if it [illegible] that appellee was negligent, he would not be [illegible] unless it can be said [illegible] was the sole cause of his injury. We [illegible] the jury whether appellee was [illegible] of the evidence.

It is next insisted that the [illegible] evidence rules 7 and 30 of appellant [illegible] as follows:

"7. Definitions. Train. An engine [illegible] more than one engine or motor coupled with or without cars, displaying markers.

"30. The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade."

It is urged that these rules were not applicable to the situation here involved. This point is not well taken, and the court did not err in admitting said rules.

Other objections were urged to the rulings of the court on the evidence. We have searched the record in connection with the grounds urged against such rulings. While some of them were subject to criticism, no substantial error was committed, and we would not be warranted in reversing the judgment for the rulings on the evidence.

It is next insisted that the court erred in giving the fourteenth, fifteenth and twenty-fourth instructions given on behalf of appellee. The complaint as to instruction 14 is in reference to the language therein: "or in work so closely related to such commerce as to be practically a part of it," and in instruction 15 to the words: "or in work so closely related to it as to be substantially a part of such commerce." The complaint as to instruction 24 is as to the words: "engaged in performing a service for the defendant which was reasonably necessary in aid and furtherance of interstate commerce and so closely related thereto as to be substantially or practically a part of such commerce."

The court did not err in giving these instructions. Chicago & Alton R. Co. v. Industrial Commission, [illegible] Ill. [illegible], [illegible]-610; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260-264; Industrial Accident Comm. v. Davis, 259 U. S. 182-187; Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556. It might also be observed that given instructions 13 and 21 on behalf of appellees contain language of the same character.

Appellant also complains of the court's refusal to give [illegible] instructions tendered by it. Appellant submitted [illegible] instructions, [illegible] of which were given. Many of said [illegible] fused instructions were abstract in form, many were argumentative, and many of them did not state correct principles of law. So far as correct principles were stated in the refused instructions, they were contained in appellant's given instructions. The instructions given on behalf of appellant submitted to the jury its case in as favorable a light as the record warranted.

Where a party offers two or more instructions, embodying the same proposition in varying language, he will not be heard to complain because the court refused the one the party considers the most important, where the others are given. City of Evanston v. Richards, 224 Ill. 444-448; Clifford v. Pioneer Fire-Proofing Co., 232 Ill. 150-157; Swaim v. City of Joliet, 219 Ill. App. 123-128; Paden v. Rockford Palace Furniture Co., 220 Ill. App. 534-545.

It is next insisted that counsel for appellee in his opening argument misstated the testimony of the witness McManaman. This he concedes, but states that it was innocently done. The statement complained of was that McManaman testified that "the engines were moved suddenly toward the north, without bell or warning." This was objected to by Mr. Wilcox, representing appellant, who stated: "The foreman, McManaman, did not testify that the movement was made without the ringing of the bell." The court stated: "I don't remember that he did." Thereupon, counsel for appellee stated: "Well, I remember he did. I positively remember that he did. He was asked if the bell was rung or any warning given, and he said no." The court: "If that is your recollection——" Mr. Ryan: "It is not only my recollection, but it is the evidence in the case. I am not responsible for counsel's lack of memory. I will trust to the recollection of you men of the jury, and I reiterate that McManaman positively testified that he heard no bell rung." This statement was objected to, and the objection was overruled by the court.

While counsel for appellee should have been more careful in the statement of his recollection of the testimony, we would not be warranted in reversing the judgment on account of such remarks, for the reason as stated, counsel for appellee was merely stating his recollection of the testimony, and it is finally for the jury to say what has been testified to, as well as the weight to be given the same. The court therefore did not err in refusing to grant a new trial on account of the remarks of counsel.

Lastly it is insisted that the verdict of the jury is excessive.

The injuries to appellee are undoubtedly serious. At the time of the accident appellee was [illegible] years of age. He left school while in the seventh grade, and has never held a clerical position of any kind. While in the employ of appellant he received $150 per month. Following the injury he was taken to a hospital and an attempt was made to set his leg. About two weeks thereafter the leg was amputated about 10 inches below the hip bone. Subsequently some [illegible] to 80 lancing operations were performed, and for several months appellee suffered severe pain. Some five months after the accident the leg became swollen and the stub was again lanced. Thereafter a second operation was performed, which left a stump of about five or five and one-half inches. The testimony tends to show that appellee has never been able to wear an artificial limb. Since the injury he has been able to earn from $12 to $17.50 per week. He was in good health before the injury, weighing about 185 pounds. Since the accident he has lost weight and his general health has not been good.

"In this character of case the damages are for the determination of the jury, and unless we are able to say that the verdict is so excessive as to indicate that the jury were moved by prejudice or passion, we would not be warranted in reversing the judgment on the ground that the verdict is excessive. Posch v. Chicago Rys. Co., 221 Ill. App. [illegible]-256; Kavale v. Morton Salt Co., [illegible] Ill. App. [illegible]; [illegible] v. Chicago, R. I. & P. Ry. Co., 245 Ill. App. [illegible]; [illegible] v. Chicago & W. I. R. Co., 239 Ill. App. [illegible]-221."

This we are unable to do.

In connection with the argument that the verdict of the jury was excessive, counsel for appellant insist that the court erred in giving appellee's instruction No. [illegible]. This instruction, among other things, states:

"The court instructs the jury that * * * in assessing the plaintiff's damages, if any, the jury should take into consideration * * * any loss of health or strength, if any, which the jury may believe from the evidence the plaintiff

tiff has sustained or will sustain as a direct result and consequence of such injury, if any; also the value of the plaintiff's time lost, if any, by reason of such injury, and his ability, if any, to work and earn money in the future, so far as any of the above-mentioned elements of damages, if any, have been charged in the plaintiff's declaration and shown by a preponderance of the evidence."

It is first insisted that the court erred in telling the jury that they might assess damages to plaintiff for any "loss of health or strength, so far as shown by the evidence." While it is conceded that appellee testified that the condition of his health had not been good since the accident, it is insisted that he was not corroborated by the other evidence. The weight of the evidence was for the jury, and this point is not well taken.

It is also contended that said instruction was erroneous in failing to limit the loss of future earnings to their present value. Instruction No. 32, given on behalf of appellant, is as follows:

"If you should come to the assessment of damages in this case, you can only allow plaintiff on account of loss of earning power, the present cash value of such loss of earning power."

The instructions are to be taken as a series. Appellee's instruction No. 35 did not direct a verdict, and, taken in connection with appellant's instruction 32, correctly informed the jury that the future earnings of appellee must be determined on their present cash value. This holding is supported by the decision in Louisville & N. R. Co. v. Holloway, 246 U. S. 525. We would not be warranted in reversing the judgment for the giving of said instruction.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Be it remembered that, to-wit, on the 23d day of September, A. D., 1920, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

8140

EUGENE DOLLE, Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant

Appeal from Circuit Court of Lake County

On this day came again the said parties, and the Court, having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, finds that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that in said record there is no error.

Therefore it is considered by the Court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant, his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and thirty, within and for the Second District of the State of Illinois.

Present: The Hon. Thomas M. Jett, *Presiding Justice*; Hon. Norman L. Jones, Justice; Hon. Franklin H. Boggs, Justice; Justus L. Johnson, Clerk; Floyd S. Clark, Sheriff.

Be it remembered that, to-wit, on the 7th day of October, A. D., 1930, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

8146

Eugene Bolle, Appellee,

vs.

Chicago and North Western Railway Company, Appellant

Appeal from the Circuit Court of Lake County

Now on this day comes the appellant and petitions the court for a certificate of importance and appeal to the Supreme Court of Illinois herein. And the court having duly considered said petition as well as the matters and things alleged in support thereof, and being now fully advised in the premises; It is therefore ordered by the court that said petition for a certificate of importance and appeal to the Supreme Court of Illinois herein, be and the same is hereby overruled and denied.

And again on this day comes the said appellant and moves the court to stay issuance of mandate and execution herein pending application to Supreme Court of Illinois for a writ of certiorari, herein. And the court having duly considered said motion and being now fully advised in the premises; It is therefore ordered by the court that issuance of mandate and execution herein be and the same is hereby stayed pending application to the Supreme Court of Illinois for a writ of certiorari, herein.

At a term of the Appellate Court begun and held at Ottawa, on Tuesday, the third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the Second District of the State of Illinois.

Present: The Hon. Thomas M. Jett, Presiding Justice; Hon. Norman L. Jones, Justice; Hon. Franklin R. Dove, Justice; Justus L. Johnson, Clerk; E. J. Welter, Sheriff.

Be it remembered that, to-wit, on the 3rd day of February A. D. 1931, certain proceedings were had and orders made and entered of record by said court, among which is the following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT,
OCTOBER TERM, A. D. 1930

GEN. NO. 8145

EUGENE BOLLE, Plaintiff and Appellee,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Defendant and Appellant.

Appeal from Circuit Court Lake County, Illinois

Hon. Claire C. Edwards, Judge, Presiding

ORDER STAYING ENFORCEMENT OF JUDGMENT, ETC.

Upon the application of the Chicago and North Western Railway Company, Appellant, for a stay of proceedings and of the enforcement of the judgment appealed from in the above entitled action, and upon its representations and the stipulation of said parties filed herewith, and upon all the records and proceedings in said cause; and it appearing that the Supreme Court of Illinois has denied writ of certiorari to this court in said cause, and that said appellant intends in good faith to timely apply to the Supreme Court of the United States for a writ of certiorari, directed to this court, to review the judgment and decision of this court in said cause;

It is hereby ordered, under and by virtue of the Act of Congress of February 13, 1925, (U. S. Code, Title 28, Sec. 350), that the execution and enforcement of the judgment in favor of the plaintiff in said cause be, and it is hereby, stayed for a reasonable time, not to exceed the period prescribed by the Federal statutes for filing petition for a writ of certiorari in the Supreme Court of the United States, to enable said Appellant to apply for and obtain such writ of certiorari; and, until such application for such writ be denied, or, if granted, until the final determination of said cause, on review by said Supreme Court of the United States.

Dated at Hillsboro, Illinois, February 23rd, 1931.

(Signed) Thomas M. Jett, Justice of the Appellate Court of Illinois, Second District.

(Endorsed on the back as follows: Filed Feb. 26, 1931. Julius L. Johnson, Clerk Appellate Court, Second Dist.)

Be it remembered that, to-wit, on the 19th day of March, A. D. 1931, there was filed in the Clerk's Office of said Court, a certain Order of the Supreme Court of Illinois, which Order is in the words and figures following, viz:

UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Supreme Court begun and held at Springfield on Tuesday, the third day of February, in the year of our Lord one thousand nine hundred and thirty-one, within and for the State of Illinois.

Present: The Honorable Frank K. Dunn, Chief Justice; Honorable William M. Farmer, Justice; Honorable Warren W. Duncan, Justice; Honorable Clyde E. Stone, Justice; Honorable Oscar E. Heard, Justice; Honorable Frederic R. DeYoung, Justice; Honorable Warren H. Orr, Justice; Oscar E. Carlstrom, Attorney General; Warren C. Murray, Marshal.

Attest:

Charles W. Vail, Clerk.

Be it remembered that, to-wit, on the 17th day of February A. D. 1931, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

No. 20567

CHICAGO & NORTH WESTERN RAILWAY COMPANY, a Corporation, Petitioner,

v.

EUGENE BOLLE, Respondent

Certiorari to Second District

February 17, A. D. 1931.

And now on this day, the Court having duly considered the petition for a Writ of Certiorari herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning th premises, doth overrule the prayer of the petition and denies a writ of Certiorari herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme Court at Springfield, in said State, this 19th day of March in the year of our Lord one thousand nine hundred and Thirty-one.

(Signed) Chas. W. Vail, Clerk of the Supreme Court.
(Seal.)

(Endorsed on the back as follows: Filed Mar. 19, 1931. Justus L. Johnson, Clerk Appellate Court, Second Dist.)

State of Illinois,
Second District, ss:

I, Justus L. Johnson, Clerk of the Appellate Court, in and for the said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the above and foregoing is a true, full and complete copy of the Abstract of Record of Appellant filed on the 10th day of September, A. D. 1929, and a true, full and complete transcript of the Record and Proceedings of the said Appellate Court, including the [illegible] opinion of said Court, all in the above entitled cause, of record in my office.

In Testimony Whereof I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this [illegible] day of April, in the year of our Lord one thousand nine hundred and thirty-one.

Justus L. Johnson, Clerk of the Appellate Court, Second District of Illinois. (Seal Appellate Court, Second District, State of Illinois.)

[fol. [illegible]] Supreme Court of the United States

Order Allowing Certiorari—Filed June 1, [illegible]

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, [illegible] is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(948)

FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1930.

No. [redacted] 60

Chicago and North Western Railway Company,
Petitioner,

vs.

Eugene Bolle,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, AND BRIEF IN SUPPORT THEREOF.

Ray N. Van Doren,
Samuel H. Cady,
Counsel for Petitioner.

Nelson J. Wilson,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. [illegible].

No. [illegible].

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,
vs.
EDWARD BOLLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Chicago and North Western Railway Company respectfully shows to this Honorable Court:

A.

*Summary Statement of the Matter Involved.

Respondent, a common laborer twenty-two years of age, had been in your petitioner's employ for [illegible] weeks as the fireman of a stationary heating plant at Waukegan, Illinois. The plant heated, by means of steam distributed in permanently placed pipes, the roundhouse and several outlying and nearby buildings, including the passenger de-

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* As the Brief, infra, contains a more complete statement of facts, with appropriate references to the record, such references are omitted here. Rule [illegible], § 2; Rule [illegible], § [illegible].

pot, and, sometimes, intrastate suburban passenger coaches used between Chicago and Waukegan, Illinois. If and when the stationary boiler or furnace of such plant was "out of commission," an ordinary steam locomotive was brought into the roundhouse and was connected with the heat pipes, and plaintiff fired such "heater-engine." In firing the furnace he shoveled the coal from a nearby bin, but when the "heater-engine" was being used, and the coal in its tender ran low, it was necessary to detach the engine from the heat pipes and take it to the coal chutes (a long building beside the tracks, containing about twenty chutes or hoppers, side by side), which were located at a place called Beach, in the Waukegan yards, in the State of Illinois, for a further supply of coal. This was done by coupling it to yard and switching locomotives also needing coal, as they daily did, and proceeding north from the roundhouse to the chutes, the most northerly engine of the string hauling the others, and one of the roundhouse laborers going along in the heater-engine to keep its fire from going out, but neither he nor the heater-engine taking part in the movement, but just being hauled to the chutes and back by the active or operating engines. The actual coaling of all engines at the chutes is done by employes of a contractor, who direct the operating crews of the active or operating engines as to where and when and as to opposite which chute to "spot" the engines, etc. On his first such trip to the chutes, (December 4, 1922, at about 9:15 P. M., dark) plaintiff, not knowing or inquiring as to the method of taking coal, got on top of the heater-engine and pulled the chain of an opposite chute or hopper, and while he was so doing the engines were moved and he was caught between the coal spout or slide and the cab of the heater-engine, one of his legs being thereby so crushed as to necessitate amputation above the knee.

He brought this suit against your petitioner under the Federal Employers' Liability Act to recover damages for his injuries. His case was first tried in [illegible] in the Circuit Court of Lake County, Illinois, and he was given a verdict for $[illegible]. On your petitioner's appeal to the Appellate Court of Illinois, Second District, the judgment on the verdict was reversed and the cause ordered to be remanded on the ground that plaintiff was not, at the time of his injury, engaged in interstate commerce, no other assigned error being considered or decided. But plaintiff moved that the remanding part of such order be stricken so that the case might be taken to the Supreme Court of Illinois on the sole question decided, which motion was granted. *Bolle v. C. & N. W. Ry. Co.*, [illegible] Ill. App. [illegible]; *Bolle v. C. & N. W. Ry. Co.*, [illegible] Ill. App. [illegible]. The Supreme Court of Illinois reversed the judgment of the Appellate Court and remanded the case to that court with instructions to either affirm the trial court judgment or remand the cause for a new trial, holding that the question whether the facts brought plaintiff within the Liability Act was for determination by the jury as a question of fact. *Bolle v. C. & N. W. Ry. Co.*, 324 Ill. [illegible]. Thereupon the Appellate Court refused to affirm the trial court judgment, but obeyed the instructions of the Supreme Court (omitting and again publishing its first opinion, that plaintiff was not engaged in interstate commerce) by remanding the cause to the trial court. *Bolle v. C. & N. W. Ry. Co.*, [illegible] Ill. App. [illegible]. Another trial was had in the Circuit Court of Lake County (but before a different judge), at the close of which the court directed a verdict for defendant on the ground that, as a matter of law, plaintiff, at the time of his injury, was not engaged in interstate commerce. Plaintiff appealed to the Appellate Court and that court ([illegible] Ill. App. [illegible], opinion not published) reversed and remanded on the ground that the Supreme Court had held ([illegible] Ill. [illegible]), on substantially the same facts, that the interstate commerce question was for the jury, which opinion was binding on it, this case was again tried and plaintiff had a verdict for [illegible], which was affirmed by the Appellate Court. Bolle v. C. & N. W. Ry. Co., [illegible] Ill. App. [illegible], on both the interstate commerce issue and the merits. As to the interstate commerce issue the decision follows that of the Supreme Court, that the question was one of fact for the jury and, therefore, that its verdict could not be disturbed by the court unless it was contrary to the manifest weight of the evidence.

There is no dispute as to the facts bearing on the question of the purpose of or as to what plaintiff was doing at the time of his injury. He was putting coal into a bin which was a part of the heater-engine, from whence he later would shovel it into the firebox of this heating-plant for the purpose of generating steam to be transmitted through permanently placed pipes to heat buildings and offices and, sometimes, intrastate suburban coaches.

As to the character of plaintiff's work at the time of his injury, whether interstate or not, the situation is exactly the same as though the so-called stationary boiler or heating-plant, with its coal bin, had been installed and maintained as a fixture in the roundhouse, and such fuel had been hauled to the chutes to fill the coal bin, plaintiff taking it to keep the fire alive, and being hurt while putting coal into the bin from the chutes. The fact that the heating-plant in use at the time in question happened to be a locomotive or engine in no way changes the situation.

There have been three lower decisions that he was not engaged in interstate commerce and two that the question whether the undisputed facts brought him within the [illegible] bility Act was for the jury and not for the court. There has been no decision by any court [illegible].

There are also in the case [illegible] of [illegible] exception of [illegible] rulings on [illegible] improper argument of counsel to the jury, improper instructions and refusals to instruct the [illegible].

Reasons Relied on for the Allowance of the Writ.

Your petitioner respectfully suggests the following reasons relied on for the allowance of the writ:

1. The state court has decided a federal question of substance in a way not in accord with applicable decisions of this court.

The decision of the Appellate Court, bound by the decision of the State Supreme Court, makes it the law of the state in suits brought under the Federal Employers' Liability Act, even where the facts as to and the purpose of what the employe was doing at the time of his injury are undisputed or even stipulated, that the question of whether such facts bring the parties within the [illegible] the ultimate determination of the [illegible] determination of it may not be disturbed [illegible] in the case was not such that all reasonable minds must necessarily agree that at the time of the accident plaintiff's employment was not such as to bring him within the provisions of the Federal Employers' Liability Act. This quotation is from the State Supreme Court's decision [illegible] and was [illegible] adopted and followed by the Appellate Court [illegible] through this court, on identical or similar facts, may have held that the Act did not apply.

In its opinion, [illegible] Ill. App. [illegible], the Appellate Court quotes and adopts the Illinois Supreme Court's statement of the facts, which included many irrelevant facts ([illegible] Ill. App. [illegible]); and quotes, adopts and adds to that court's statement of the law ([illegible] Ill. App. [illegible]), as follows:

> "Whenever an issue is made in a case, and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony, or the evidence may be agreed upon or embodied in a stipulation of fact."

In the Appellate Court's opinion no mention is made of the line of authorities actually applicable, although they were submitted to that court in your petitioner's brief therein.

2. On the evidence, plaintiff was not, as matter of fact or law, engaged in interstate commerce at the time of his injury.

3. In the evidence there was no dispute as to the purpose of or what plaintiff was doing at the time of his injury, and the question of whether, on such facts, he was then and there engaged in interstate commerce was for the court and not the jury.

4. Even if the question was one of fact for the jury the verdict is wrong, as has been repeatedly held by this court on like facts.

5. Improper evidence on the subject of interstate commerce was admitted over your petitioner's objections, and was submitted to the jury though the trial court was duly requested to take it from them.

6. The principal negligence alleged and attempted to be proved was that the movement of the engine [illegible] the injury was started without the ringing of a bell. The only testimony to that effect was plaintiff's, that he didn't hear any bell, but he also admitted [illegible] bell before the starting of any other of the many movements, back and forth, and from track to track, prior to the movement in question, and that he [illegible] was not paying any attention to signals of any kind, by bell or otherwise. Notwithstanding which the [illegible], over your petitioner's objections, was allowed to argue to the jury, repeatedly, in his summation, that plaintiff's witness McManaman, the foreman in charge of the engine, had testified that the bell was not rung. McManaman did not so testify.

7. The trial court refused your petitioner's requests to instruct the jury as (in substance) follows:

a. That unless plaintiff was engaged in interstate commerce he has no cause of action under the Liability Act, but that a finding that he was not so engaged would not deprive him of any other remedy; that they should not consider the effect of such a finding on any other question involved, etc. (No. 6, R. 147.)

b. That if the ringing of the bell would not have prevented the injury they must find for the defendant. (No. 11, R. 150.)

c. That the coupling of the bunter-engine to the other engines did not change the character of plaintiff's work, etc. That it was only plaintiff's work that was in question. (Nos. 22, 23, 24, R. 152, 153.)

d. That the fact that these other engines were to be used for thereafter engaging in interstate transportation [illegible] the question of whether plaintiff was engaged in interstate commerce. (No. [illegible], R. [illegible].)

That plaintiff at the time of his injury was not engaged in interstate transportation. (No. [illegible], R. [illegible].)

That they should not find from the fact that the locomotives heated buildings and [illegible] boxcars that plaintiff was engaged in interstate commerce. (No. 25, R. [illegible].)

That an employe is not engaged in interstate commerce while [illegible] coal for a heating plant, or while firing [illegible] such a plant, the purpose of the heat from which is to heat buildings in which other employes are engaged in interstate commerce, etc. (No. [illegible], R. 156.)

That the movement of the four engines coupled together from the roundhouse in Washington to the coal chutes at [illegible] (all within the State of Illinois) was not a movement in interstate transportation. (No. [illegible], R. [illegible].)

The trial court erred in instructing the jury as (in substance) follows:

That the test of plaintiff's work was whether he was at work for the defendant in interstate commerce or in work so closely related to such commerce as to be practically a part of it," etc. (No. [illegible], R. 157-8.) (Which is an [illegible], misleading and wholly erroneous statement of the Illinois case law, supra.)

The same error as in last above, except that the words "practically a part of such commerce" were used. (No. [illegible], R. [illegible].)

The same error except that a more erroneous paraphrase of the test was used. (No. [illegible], R. [illegible].)

8. [illegible] in assuming plaintiff's [illegible] conduct [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

9. There was not sufficient evidence in law to [illegible] to prove that negligence of your petitioner was the proximate cause of plaintiff's injuries.

10. Having himself observed that all of the several prior movements of the engines were started without first ringing the bell, plaintiff assumed the risk of [illegible] movements, as a matter of law.

11. Plaintiff testified that several years after the accident his "health fell down" and he had to quit a job he then had. The court instructed the jury that, in assessing damages, they might consider "any loss of health or strength" etc. There was not, in the evidence, any connection between the accident and the pretended "falling down" of his health. The damages assessed were [illegible] 00.00, and plaintiff sustained no injury except the loss of his leg.

12. Plaintiff was guilty of contributory negligence that (a) was the sole cause of his injury, or (b) should have mitigated his damages.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court of Illinois, Second District, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, and that said decree or judgment of said Appellate Court may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Chicago and North Western Railway Company,

By Ray N. Van Doren,

Samuel H. Cady,

Counsel for Petitioner.

Nelson J. Wilcox,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,
vs.
EUGENE BOLLE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion in the Appellate Court of Illinois, Second District, is reported in *Bolle v. Chicago and North Western Railway Company*, Advance Sheets, 259 Ill. App. 562. (Copy of the Opinion, *R. 172-180.)

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*The references to "R" are to the pages of the Certified Transcript, the first 170 of which are the printed "Abstract" used in the Appellate Court. These 170 pages are numbered at their tops. The pages of the rest of the Transcript are numbered at their bottoms.

II.

Jurisdiction.

1. Plaintiff's cause of action, if any, and defendant's defenses, if any, depend upon the provisions of 35 Stat. 65, ch. 149 (U. S. C., Tit. 45, secs. 51-59), known as the Federal Employers' Liability Act.

A final judgment has been rendered or passed by the highest court of Illinois in which a decision could be had involving rights, privileges and immunities specially set up and claimed by both parties under the Constitution and statute (35 Stat. 65) of the United States, and this court has jurisdiction to review by virtue of sec. 344 (Judicial Code, sec. 237, amended), U. S. C. A. 28.

2. The date of the judgment to be reviewed is September 22, 1930 (R. 171). The Appellate Court had entered a judgment and opinion on an earlier date (R. 168), but, on defendant's motion for a rehearing, struck it from the files and entered a new judgment and opinion on said date, and denied defendant's motion for rehearing. (R. 170, 171, 172-183, 184.) *But that is not the date from which the statutory period of time within which to make application to this court for writ of certiorari is to be computed, which is February 17, 1931,* as appears from the following:

Thereafter your petitioner duly applied to said Appellate Court for a certificate of importance to the Supreme Court of Illinois, under ch. 110, par. 120, Cahill's R. S. Ill. (See *Minneapolis, etc., v. Rock,* 279 U. S. 410), but the court on October 7, 1930, denied the application. (R. 186.)

Thereafter your petitioner duly applied to the Supreme Court of Illinois for a writ of certiorari to review said cause and said decision and judgment of the Appellate Court, but said Supreme Court denied the application by order duly entered on *February* [illegible], [illegible]. (R. [illegible])

3. The nature of the case and the rulings below are such as to bring the case within the jurisdictional provision relied on.

4. Cases believed to sustain the *jurisdiction*:

St. Louis, etc., v. McWhirter, 229 U. S. 265.
Seaboard Air Line v. Horton, 233 U. S. 492, 499.
American Ry. Express Co. v. Levee, 263 U. S. 19, 20.
Minneapolis, etc., R. Co. v. Rock, 279 U. S. 410, 411, 412.

III.

Statement of the Case.

Although a statement of "the matter involved," with a specification (designated as reasons for issuing the writ) of such of the assigned errors as are intended to be urged, is contained in the foregoing petition, yet for more completely informing the Court, and that we may fully comply with the rules, we here give a short *statement of the facts,* with appropriate references to the pages of record, as follows:

Plaintiff was hired to fire a heating-plant in the railroad's roundhouse at Waukegan, Illinois. (R. 33.) This heating-plant was connected by permanently placed underground pipes with and heated, sometimes, suburban coaches and a turntable (R. 73), and the roundhouse, passenger depot, baggage room, foreman's office, a register room, bunk car, carpenter shop and maintenance of way car (R. 69), all except the coaches being stationary buildings (R. 77). The central unit of that plant consisted at times of a "stationary" boiler or furnace, and at other times of a locomotive substituting therefor. He went to work November 15, 1922 (R. 34), and his first five days the locomotive (heater-engine) was the central unit of the plant and he fired it. (R. 73.) Thereafter for several days the furnace was used and then again, the day before and the day of the accident, the locomotive. (R. 73.) When firing the furnace plaintiff shoveled the coal into the firebox from a nearby bin. When the locomotive was used the coal supply was in the bin in its tender and had to be replenished from time to time by hauling the locomotive to the coal chutes located at Beach, Illinois, in the Waukegan yards, about four miles from the roundhouse. Each night the Waukegan yard and switching locomotives, or some of them, went to the chutes to be coaled, so they were used to haul the heater-engine from the roundhouse to the chutes and back. The evening of the accident the heater-engine needed coal, so it was taken out of the roundhouse and coupled to three active locomotives and was by them hauled to the chutes, plaintiff accompanying it to keep its fire going. (R. 26, 51, 52, 67, 68.) It was after 9:30 P. M. (R. 26.) On the way, but before getting to the chutes, water was taken into one or two of the locomotives, plaintiff assisting in putting water into the heater-engine, which operation was interrupted and he got back in the cab and stayed there while the engines were side-tracked to let a train go by. Thereafter the engines started out of the sidetrack and towards the chutes and plaintiff then again got up on top, but on the rim of the coal-bin and just back of the cab, and rode there, hanging onto the roof of the cab, during the rest of the movements, and was there in that place when he got hurt. His explanation of *why* he got up to and so rode in that place is that he thought they were to take more water into the heater-engine, but he admits, and it is the fact, that he could not, and that he knew that he could not, take water into the engine from that place. There was no reason whatever for his being there. (R. 26, 27, 28, 29; 36-7, 38, 39.) After the engines got to the chutes two of them were coaled by and under the directions of "the coal-chute man," (R. 38, 39) not an employe of defendant. (R. 38-9.) While this was going on plaintiff stood on the rim of the coal-bin of the heater-engine. It was dark, the chutes were not lighted and he had no lantern. (R. 27-9.) He says that after the second

"Spotting" he saw a man he thought was his straw-boss Tony on the next engine reach up and pull down a slide, so he did the same, pulling down a slide into his tender, so that he then was between the slide and the cab. (R. 41, 42, 43, 44.) Then the engines were again moved and he was caught and injured. (R. 28.) He testified that at no time prior to the accident were any signals of any kind given, although many backward and forward movements were made; (R. 39, 40) he saw none given by anybody, and heard none, which he explained by saying "I wasn't paying any attention." (R. 40.) There was no other evidence in the case on the subject of *lack* of signals. The man operating the engine that moved the others testified that he rang the bell before each of the various movements (R. 93, 97) and of course all of the movements back and forth through the switches were controlled and made on lantern or other signals, and all of the movements at the chutes were made on the oral instructions (R. 59, 60) of the "coal-chute man." No coal was taken after the accident, and three engines had been coaled before it happened. (R. 63.)

Plaintiff had never before seen the side of a coal chute from which the coal is taken and had no knowledge of how they worked. (R. 34, 35.) The coal-bin of the heater-engine is in the front end of the tender just back of the cab and in front of the water tank. (R. 37.) Water is taken through a hole in the top of the tank, remote from the cab and to the rear of the coal-bin. (R. 38-9.) To get from the place where plaintiff rode, hanging onto the cab roof, to the place to take water into the engine he would have to get down into the front end of the coal-bin and go across to and climb up the back end of it. (R. 46-7.)

Plaintiff testified:

> "On all of this whole trip, from the roundhouse until I got hurt, my engine was just being hauled or

pushed by the other engines. I didn't know anything about operating it. The power wasn't connected up on my engine at any time on the trip from the round-house up to Beach.'' (R. 44.)

Although plaintiff's counsel has greatly stressed the testimony of his witness McManaman, the *foreman* of the switch crew, an ex-employe at the time of the trial (R. 49), that he saw a man on top of the heater-engine before the movement that hurt plaintiff, in time to do something, but did nothing (R. 60), there is nothing to it, for it is clear from his testimony that he thought the man he so saw was the ''coal-chute man,'' who was himself directing all of the movements of the engines, and, therefore, he expected no movement to be made (R. 60); no member of the switch crew would be endangered by a movement of the engines, and plaintiff was supposed to be and should have been in the cab of the heater-engine. (R. 60-63.) Neither the coal-chute man nor the operator of the engine who moved it at the time in question *could* see Bolle from their positions. This is clear and undisputed. (R. 63, 91, 94, 95, 107-8, 118.)

IV.

Errors Intended to be Urged.

In our petition we have stated, in numbered paragraphs, the ''reasons relied on'' for the issuance of writ of certiorari. They constitute a specification of such assigned errors as are intended to be urged. However, for compliance with the rules, we here, more briefly, designate such errors:

1. The trial court should have instructed the jury to return a verdict in favor of defendant, and the Appellate Court should have so held. (R. 130.)

2. On the undisputed evidence as to what plaintiff was doing at the time of his injury he was not within the Federal Employers' Liability Act.

3. The question of whether the facts brought plaintiff within the Liability Act was one of law for the court.

4. No actionable negligence of defendant was proved.

5. Plaintiff assumed the risk.

6. Plaintiff's own negligence was the sole proximate cause of his injury.

7. The trial court admitted improper evidence over defendant's objections.

8. The trial court allowed misstatements of the evidence to be made to the jury over defendant's objections.

9. The trial court improperly instructed the jury and improperly refused to give instructions duly requested by defendant.

10. Excessive damages were awarded, due to improper instructions on the subject and to passion and prejudice of the jury.

All of the foregoing errors, with others, were properly assigned in the Appellate Court. (R. 156-60.)

V.

Argument.

A.

The plaintiff has no cause of action under the Federal Employers' Act, because he was not engaged in Interstate Commerce at the time of his injury.

D. L. & W. v. Yurkonis, 238 U. S. 439.
Shanks v. D. L. & W., 239 U. S. 556.
C. B. & Q. v. Harrington, 241 U. S. 177, 180.
Illinois Central v. Cousins, 241 U. S. 641.
M. & St. L. v. Nash, 242 U. S. 619.
B. & O. v. Branson, 242 U. S. 623.
Heed v. Indus. Comm., 287 Ill. 505.
Great Northern v. King, 161 N. W. (Wis.) 371.

"The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate TRANSPORTATION or in work so CLOSELY related to IT as to be practically a part of it."

Shanks v. D. L. & W., 239 U. S. 556, 558.

The *Shanks case* was decided in January, 1916, and this court has consistently ever since adhered to that test.

The *relation* to interstate transportation, which is the second or alternative part of the test, must be *close and direct.*

C. B. & Q. v. Harrington, 241 U. S. 177, 180.

There can here be no contention that plaintiff was "at the time of his injury engaged in interstate transportation," and it follows that unless he was engaged "in work so closely related to it [interstate transportation] as to be practically a part of it [interstate transportation]" he was not within the *Act* because the facts do not satisfy the test.

That the *Shanks case* test, when applied to the facts in this case, demonstrates our proposition seems clear from the decisions of this court in cases involving similar facts.

"As was held by the Appellate Court of Illinois in its first two decisions, this case is governed by and is indistinguishable from, on facts and law, this court's decision in *Illinois Central v. Cousins*, 241 U. S. 641, reversing the Supreme Court of Minnesota's affirmance of a judgment for damages for personal injuries sustained by an employe while he was wheeling a barrow of coal to the railway company's repair shops for use in stoves which heated such shops, and in which shops other employes repaired interstate equipment and were within the second part of the *Shanks case* test. The trial court had held as a matter of law that Cousins was engaged in interstate commerce, and the Minnesota Supreme Court had affirmed (*Cousins v. Ill. Cent.*, 126 Minn. 172) believing that the *Pedersen case* (229 U. S. 146) governed and on the theory that because the men in the shops were engaged in interstate commerce Cousins also was so engaged while getting coal to keep them warm, saying: "The repairs could not be made unless the shop was heated." The reversal by this court, by per curiam decision, was "upon the authority of" this court's decisions in the *Yurkonis* (238 U. S. 439) and *Shanks* (239 U. S. 556) cases, in which it was held that the work of the employe was too remote from interstate transportation to be practically a part of it."

In the [illegible] case, supra, the employe was making [illegible] thereafter to be used in engines engaged in [illegible] purposes.

In the *Shanks* case, *supra*, the employe was changing the location of a shaft that communicated motive power to machinery used to repair interstate locomotives in the shop provided for that purpose. *Usually* his work consisted in repairing such locomotives. This court held that his usual work was immaterial, and that he was not engaged in interstate commerce while changing the location of the shaft.

Furthermore, in the case at bar, the decision below is based upon evidence that plaintiff, when not firing the heating-plant or getting coal for it, sometimes performed such work as "watching engines in the roundhouse, sanding them, turning turntables, and other duties in the roundhouse with reference to engines engaged in both interstate and intrastate commerce." The State Supreme Court included those facts in its statement of facts (324 Ill. 479, 480) and the Appellate Court quoted and adopted them as its statement of the facts. (238 Ill. App. 545, 551.) In other words, the Illinois courts hold that this jury verdict properly overrules this court's decision in the *Shanks case*. The case at bar is stronger for the employe than that case, for here plaintiff's "usual" employment was that of janitor of the heating-plant and the other work he did was incidental or accidental and performed only when Tony, his straw-boss, was occasionally absent from the roundhouse for short times. (R. 23.)

That it was plain error to consider as determinative of the question of the character of plaintiff's work, any evidence except that bearing on the service he was performing when hurt, is beyond question.

Shanks v. D. L. & W., 239 U. S. 556.

Congress had the power to regulate the liability of carriers for injuries to employes engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time, isolatedly considered, is in interstate or intrastate commerce, but *it did not exercise that power* but confined the liability to injuries occurring to employes *when the particular service in which they are employed at the time of injury is a part* of interstate commerce.

Illinois Central v. *Behrens*, 233 U. S. 473-7, 8.

And this jury verdict is also held to properly overrule this court's decision in the *Cousins case, supra,* in being, partly at least, based upon the fact that the heat from this roundhouse heating-plant warmed buildings in which other employes were engaged in interstate commerce. See decision of the Illinois Supreme Court, 324 Ill. 479, 481; and of the Appellate Court, adopting the same statement of facts, 232 Ill. App. 545, 551.

In the case at bar the jury were allowed to consider the fact that the roundhouse heating-plant heated the passenger depot as determinative of the character of plaintiff's work. And this although your petitioner duly requested the trial court to instruct the jury that the heating of the depot must not be so considered. This was a further overruling of the decisions of this court.

In *M. & St. L. R. R. Co.* v. *Nash, Admr.*, 242 U. S. 619, this court reversed the Supreme Court of Minnesota in a case in which the employe was injured while engaged in transporting an outhouse to a station where it was to be installed for the convenience of interstate passengers and others. The Minnesota court held that Nash was engaged in interstate commerce, because:

> "The station buildings and the outhouses connected therewith are provided for the accommodation of interstate as well as intrastate passengers, and are unquestionably used in connection with interstate commerce." (184 N. W. 957.)

But this court reversed, by *per curiam* decision, upon the authority of the *Yurkonis* (238 U. S. 439), *Shanks* (239 U. S. 553) and *Harrington* (241 U. S. 177-188) *cases*, citing also the *Cousins case*, 241 U. S. 641.

There can be no difference in legal effect between the conveniences of heat and toilet furnished in passenger depots. The work of the employes in connection with furnishing the warmth and such *other comforts has no relation to interstate transportation.* There are several decisions by State courts that employes, while building fires in heating plants or stoves in depot buildings, shops and offices, are not engaged in interstate commerce.

Heed v. Indus. Comm., 287 Ill. 505, 506-7.
Benson v. Bush, 178 Pac. ([illegible]) 747, 748-9.
Great Northern v. King, 161 [illegible] W. (Wis.) 571, 572.

Attention is called to certain arguments of plaintiff's counsel to the jury on the interstate commerce feature of the case. (R. 132, 133.) They show how plaintiff's counsel was able to and did take advantage of these errors of the trial court. They emphasize and demonstrate that the errors were highly prejudicial. He argued, among other things, as follows:

1. That if the heating-plant heated nothing but the passenger depot plaintiff was engaged in interstate commerce in hauling coal to and firing such plant, "for the convenience and comfort of their passengers" and the employes in the depot "taking care of their interstate business."

3. That "Bolle was supplying heat to this passenger station, *where its interstate passengers were conveniently accommodated*, and where they sold tickets and transmitted messages *and carried on business that took care of the interstate commerce of the defendant.*"

There is a distinct line of authorities by this court in which this case belongs. They are cited under the caption of this part of this brief. Not one of them is cited or referred to and they are wholly ignored in the opinion below.

The decision and opinion of the Appellate Court when this case was first before it was right, and that opinion was refiled and re-entered by that court after the decision by the Supreme Court of Illinois. In it the court said that this case is not distinguishable from *Illinois Central R. Co. v. Cousins*, 241 U. S. 641. See *Bolle v. C. & N. W. Ry. Co.*, 235 Ill. App. 380, 383. On the second trial the trial court ruled that the *Cousins* decision governed, rather than the unhappy decision of the Supreme Court of Illinois, and directed a verdict in favor of the defendant. It is only fair to the Appellate Court to say that it probably is of the same opinion now as at the time of its two former opinions. (s. c. 235 Ill. App. 380; 246 Ill. App. 31; 251 Ill. App. 623) In its filed but not published opinion of January 31, 1921, 251 Ill. App. 623—when the case was remanded to it by the State Supreme Court, the Appellate Court said:

> "The action of the trial judge in directing a verdict in favor of appellee was based upon his conclusion that the appellant was not engaged in interstate commerce when he was injured. When the case was before us on the former appeal, we reached the same conclusion and so expressed it. However, the Supreme Court took a different view * * * It would seem to follow as a logical conclusion that if the Appellate Court erred in holding the plaintiff was not engaged in interstate commerce, then the trial court erred in holding that he was not so engaged. The Supreme Court held the ques-

> tion was one of fact to be submitted to a jury. It is therefore necessary to reverse and remand the cause so that the issue may be tried by a jury."

We believe that a reading of the first opinion of the Appellate Court, 235 Ill. App. 350, 352-4, 356 (re-adopted and again filed and entered as that court's opinion in this case, 246 Ill. App. 31) convinces that, as to the interstate commerce feature, it correctly states the facts and law of this case.

2.

When the facts as to what the employee was doing at the time of his injury are not in dispute the question whether such facts bring the parties within the Liability Act is for the court. It is a question of law.

Illinois Central v. Behrens, 233 U. S. 473.
P. & R. Ry. Co. v. Hancock, 253 U. S. 284.
Erie v. Van Buskirk, 228 Fed. 489-90, 493.
C. N. O. & T. P. v. Hall, 243 Fed. 76, 80.
Clemence v. H. & M. R. Co., 11 Fed. (2d) 913.
Youngstown v. Halverstadt, 12 Fed. (2d) 995, 997.
Wallace v. N. Y. etc., 121 Atl. (Conn.) 878.
Johnston v. C. & N. W. Ry. Co., 223 N. W. (Ia.) 287.
Efaw v. Indus. Comm., 237 N. W. (Wis.) 249.

In *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 475, the Circuit Court of Appeals certified to this court a short statement of the facts and asked this court whether, on such facts, the employe was engaged in interstate commerce within the meaning of the Employers' Liability Act. The question was one of law and was so treated and answered by this court under section 239 of the Judicial Code. By that section none but questions of law may be asked of or answered by this court. It cannot and will not pass upon "questions of fact or mixed questions of law and fact, but only upon a 'clean-cut question of law.'" *United States v. Mayer*, 235 U. S. 55; *Stratton's Independence v. Howbert*, 231 U. S. 399; *Graver v. Faurot*, 162 U. S. 435; Note 2, Fed. Stats. Ann. 2d Ed., vol. 5, pp. 340, 341, citing nine decisions of this court citing and following *Graver v. Faurot*, *supra*.

In *P. and R. Ry. Co. v. Hancock*, 253 U. S. 284, 285, a case involving the question whether an employe came within the Liability Act, this court said:

> "The essential facts are not in controversy; the nature of the employment, therefore, is a question of law."

In the decisions by inferior Federal and state courts hereinbefore cited to this point, it was *held error to submit the question to a jury* when the facts of the work and its purpose were not disputed. That it *must* be decided as a matter of law.

The law on the subject of what constitutes a question of fact for the jury under the Liability Act, as stated by the Supreme Court of Illinois is said to be (324 Ill. 479, 482) as follows:

> "Whether or not at the time of the accident plaintiff was employed by defendant in interstate commerce was a controverted question of fact upon which plaintiff had a constitutional right to a trial by jury. This question of fact was the main issue in the case. Whenever an issue is made in a case and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony."

The Appellate Court, 255 Ill. App., at page [illegible], quoted, adopted and applied the above quoted rule, commenting with the words "Whenever an issue is made," and added to it the following:

> "* * * or the evidence may be agreed upon or embodied in a stipulation of fact."

The probable explanation of this curious rule is that the State Supreme Court was inadvertent. But, the Appellate Court has adopted it, with the addition above quoted, and the State Supreme Court has perpetuated the inadvertence, or whatever it was, with the addition, by denying review. In any event, it is at present the law of Illinois in actions under the Liability Act so far as its courts can make it so. It must be corrected if there ever hereafter is to be any but a jury decision in Illinois on this vital question. And there never will be a jury verdict in favor of a railroad in any such case submitted to the jury as this one was submitted. It would seem that as a matter of self-defense this court should review and reverse this judgment. Every interstate carrier subject to suit in the courts of Illinois is adversely affected by the decision of the court below, and it will be of immense benefit to the bench and bar of the country at large if this court again will state the true rule, so that there may be no further confusion such as the case at bar exemplifies.

In any event, this court will, if it grant the writ prayed for, examine the record, analyse the evidence, and decide whether this plaintiff was or was not at the time of his injury engaged in interstate commerce, and the verdict of the jury will not preclude it from doing so.

Yazoo & M. V. R. Co. v. Mullins, 249 U. S. 531, 532.
Baltimore & Ohio v. Burtch, 263 U. S. 540, 542.

Substantive rights may not be impaired under the name of procedure.

Atlantic, etc. v. Burnette, 239 U. S. 199.

We insist that there is no evidence in this case tending to show that plaintiff was engaged in interstate commerce.

N. C. R. R. Co. v. Zachary, 232 U. S. 248, 258.

The question is one in which the Nation is interested, and the controlling law should be uniform and not change at every state line.

N. Y. C. v. Winfield, 244 U. S. 147, 149.

A Federal right has been denied this defendant by the verdict of a jury which is without support in the evidence.

Southern Pacific v. Schuyler, 227 U. S. 601, 611.

C.

Defendant Not Negligent.

No employe of defendant present at the time of this accident knew or had any reason to believe or even suspect that plaintiff was or would be at the place where he was at that time.

The fact that plaintiff's witness McManaman, the foreman of the switch crew, saw "a man" on top of the engine a brief period of time before the movement does not make this a "discovered peril" case, or indicate any negligence on the part of that witness. It was a dark night and there were no lights (R. 63-4). He thought that the man he saw was the coal-chute man. He testified that there was no reason why any other person, except the coal-chute man should be there (R. 61); that customarily the "engine-wipers" would be in their cabs (R. 62); that he and his helper were just standing there, some distance away from the engines, waiting for the coal-chute man to finish the coaling. (R. [illegible].)

It is uncontradicted that neither the coal-chute man nor the man who started the engines at the time in question saw or could have seen the plaintiff. (R. [illegible], 107-8, 115.)

Negligence is the basis of all liability under the Liability Act, and there can be no recovery where it is absent.

C., M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472.

The reasonable man will order his precaution by the measure of what appears likely in the known course of things.

Atchison, etc. v. Calhoun, 213 U. S. 1, 9.

There is no liability unless the injury in the way it occurred might reasonably have been anticipated. Applied here this means that there was no actionable negligence.

Gulf, etc. v. Wells, 275 U. S. 455, 458-9.
P. & R. Ry. Co. v. Allen, 9 Fed. (2d) [illegible].

Even if the engine bell was not rung, and there was evidence to support the claim that it should have been, such failure was not a violation of any duty owed to plaintiff. Any such signal, as a warning that the engines were to be moved, was for the switch crew, who might be on the tracks or in other positions of danger.

C. & O. v. Mihas, 280 U. S. 102, 105.

Plaintiff testified he knew nothing of the rules (R. [illegible]) and never had a book of rules (R. [illegible]), so it is plain that, at the time, he did not rely upon it or them.

D.

Plaintiff a Volunteer, Injured by His Own Act.

Plaintiff had no duty to perform in connection with the coaling operation. When he reached up and pulled the chain and let down the coal-slide so that he was between it and the engine cab (R. 43), he was a mere volunteer, no matter what he says about *thinking* it was his duty; and it was his own conduct that was the sole cause of his injury.

2 Roberts Fed. Liab. Carriers, 2nd Ed. sec. 874.
Great Northern v. Wiles, 240 U. S. 444.

E.

Contributory Negligence.

In no aspect of the case can the conclusion that plaintiff was guilty of contributory negligence be escaped. His own story convicts him of it. Yet the jury assessed more than full damages for his injury. Defendant's requests (R. 155) that the trial court instruct the jury that plaintiff was guilty of contributory negligence as a matter of law and that they should reduce the damages accordingly should have been granted. To refuse them was error.

F.

Plaintiff Assumed the Risk.

On plaintiff's own story he assumed the risk of a movement of the engines, even without prior signal by bell.

He put himself in a little foot-square space, between the coal-slide and the cab of the helper-engine, where, it was wholly obvious to anyone, if the engines moved in either [illegible] would be [illegible] direction he was bound to be hurt. And this although, as he testified, he had already observed that the engines were being moved back and forth without signals of any kind.

The case cited, quoted from and relied upon by the Appellate Court in denying defendant's contention as to this (259 Ill. App. 546, 557-8; R. 179) is in truth an authority for, and not against, such contention. In it, at least in one place, the Federal rule is correctly stated to be that the employe does "not assume the *risk of an unexpected negligent departure from the customary method of doing* * * * dangerous work." But the situation here was not such. Plaintiff testified, on his direct examination:

> "After the through train went through * * * I got back upon the tender * * * [The engines] went to the crossover switch and then came south; they took the crossover switch, * * * got on the east track; then they pulled south towards the coal chute. * * * After the first engine was coaled they moved south several feet (R. 27). * * * I did not receive any notice or warning that the movement [the movement that caught him] was to be made (R. 28)."

On his cross-examination he testified:

> "I again got upon the top of the tender * * * hanging onto the roof of the cab. That was not where you take water, but I said that my reason for getting up on the tender again was to take water. I stood there on that shelf while the engines came out from the side-track, and until they got on the main track, and * * * north to up beyond the coal chutes. * * * We had to go through a switch to go out of the side-track, and through a switch to get north of the crossover, and back through the same switch south. Going through all that number of switches I was standing up there on this little shelf. We went by the water pipe where I had taken water, without slowing down or stopping, and I stayed up there * * * not where they take water, for the purpose of taking water. * * * During that trip,

[illegible] the side-track and [illegible] past the [illegible] I saw [illegible] crew or by any- [illegible] member of [illegible] anybody [illegible] the engines to [illegible] I did not at [illegible] attention [illegible] * * * [illegible] took the [illegible] other par- [illegible] nobody [illegible] south from the [illegible] they first [illegible] engine [illegible] I think. I [illegible] during the [illegible] southerly [illegible] coal [illegible] moved sev- [illegible] I didn't [illegible] for the [illegible] know of [illegible] most south- [illegible] the chute [illegible] giving any [illegible] south that time."

[illegible]

[illegible] defend- [illegible] which [illegible] appealed [illegible] admitted over defendant's objection to which it was made subject (R. 68) and read to the jury and into the record (R. 81.) See [illegible] of this brief, supra.

Later, at the proper time, defendant requested the court to exclude such evidence by instruction to the jury, which was refused. (Nos. 25, 26, R. 153-4)

X.

Refusals to Instruct, and Instructions Given.

If, under the Liability Act, this case was properly for the jury, yet it should have been submitted to the jury with proper instructions as to the law.

It may not always be error to instruct generally if no specific requests are made, but if they are made they must be given if they are in accord with the Act and the interpretations of this court.

Seaboard, etc. v. *Horton*, 233 U. S. 492, 502, 503-4.
Gulf, etc. v. *Moser*, 275 U. S. 133, 136-7.

1. Refusals of Defendant's Requests.

We respectfully urge that the trial court should not have refused to give to the jury defendant's requested instructions numbered 6 (R. 147) and 21 (R. 152). At least one of them should have been given as a matter of fairness to the jury as well as to the defendant. Illinois has a Workmen's Compensation Act, which is applicable to the parties herein if the Liability Act is not, and the jury was entitled to know that a finding that plaintiff was not within the latter would not abolish employer's liability under the former. No. 21 (R. 152) was merely a fair request.

No. 11 (R. 159) was to tell the jury that even if they found that the bell was not rung, yet if they also found that ringing it would not have prevented plaintiff's injury their verdict should be for the defendant. The requested instruction applied the correct rule of proximate cause to the facts and should have been given.

No. 20 (R. 159). To refuse to give this instruction was plain and prejudicial error. The movement of the four engines coupled together from the roundhouse to the coal chutes was not a movement in interstate transportation. This is obvious. Three of the engines were yard or switch engines, sometimes in their regular work moving goods containing interstate shipments, while the fourth was this heating-plant on wheels. The movement was wholly within the State of Illinois, and was in fact but a yard-movement (both the roundhouse and the coal chutes being in the Waukegan yards), conducted and participated in by the yard switching crew only (R. 87). Nothing was being transported by any of them. They were being coaled for their regular work. If any of the employes on any of those other engines was at the time engaged in interstate commerce it was not because his work was *in* interstate transportation, but because it was so closely related to it as to be practically a part of it. *Shanks v. D. L. & W.*, 239 U. S. 556. Relying on the refusal to give this instruction plaintiff's counsel aggravated the error of the Court by arguing to the jury that this movement was a movement in interstate commerce (R. 199), saying that the active or operating engines, that hauled the heater-engine to the chutes "had interstate commerce work mapped out for them; * * * supplying these engines with coal and water for use in interstate commerce of course is employment in interstate commerce" * * * Bolle was placed in this string of engines, and while he had nothing to do with the movement of it, he was none the less engaged in a movement of interstate commerce, which was a part of that movement. Would it be pleased to hold that all of these other employes on those engines were engaged in interstate commerce, but that Bolle alone was not so engaged. No reasonable man would single out Gene Bolle on this movement, and say that he was not (so) employed when the other employes were,'' etc.

Nos. 22 (R. 133-5), 25 (R. 135) and 26 (R. 135-6) were requests to instruct the jury that (*a*) the physical coupling of the heater-engine to the yard engines did not change the character of plaintiff's work and bring what would otherwise have been work outside of interstate commerce within the Act; (*b*) that it was only the work that plaintiff himself was doing that was material to the question of whether the Act applied to him; (*c*) that the coaling of these other engines for later interstate transportation had no bearing on the character of plaintiff's work. To refuse to give these instructions was error so plain as not to admit of argument. Plaintiff had nothing to do with operating or coaling the other engines (R. 44) and nothing to do with any transportation they might later be engaged in.

Plaintiff was not a member of the crew of a train carrying interstate goods or going from one state to another; he was not a member of any crew. If the character of the work of those other employes has a bearing on or determines the character of plaintiff's work it would seem that if the engine being repaired in either the *Winters case*, 242 U. S. 353, 356, or the *Davis case*, 259 U. S. 182, had happened to be physically attached to an engine undergoing "light repairs" by other employes, and which had been interrupted in an interstate trip therefor, Winters and Davis, by virtue of that physical attachment, would have been within the Act; which seems preposterous indeed.

No. 22 (R. 166) requested the court to instruct the jury that plaintiff was not at the time of his injury engaged in interstate *transportation*, and it was plain error to refuse it. To come within the Act the employe must be either (*a*) engaged in interstate transportation, or (*b*) in work so closely related to interstate transportation as to be practically a part of it. As there was no interstate transportation involved in any work plaintiff was doing or ever did do, and the only possible way he could come under the act would be because some part of his work was so closely related to interstate transportation as to be practically a part of it, it was prejudicial error to refuse to instruct the jury accordingly. *Shanks* v. *D. L. & W.*, 239 U. S. 556, 558; *C. B. & Q.* v. *Harrington*, 241 U. S. 177, 180.

Plaintiff's counsel emphasized this error and made certain its effect upon the jury by arguing (R. 186) that defendant's counsel "goes throughout his argument the word 'transportation,' as if the word 'transportation' added some charm to the definition. Interstate commerce is a good deal more than transportation. The Federal statute uses the word 'interstate commerce.' *Listen to the court's charge on that subject.* When the court, in his instructions, tells you what the law is, *he will give you the language of the Federal statute, and the word 'transportation' is not in it.*"

No. 23 (R. 166) requested an instruction that the fact that the [illegible] tested buildings or stationary de[illegible] [illegible] did not bring plaintiff within the Act. This instruction should have been given upon the authority of the *Shanks* case and other cases *supra*.

No. 27 (R. 167) was an elaboration of No. 23 and was a direct application of the *Shanks* case, *supra*, to the facts in the case at bar. Refusal to give it was a reversible and overruling of that decision. It was similarly [illegible] to properly state to the jury the law as laid down by the court in the *Coleman* case applied to the facts in the case at bar.

5. Erroneous instructions given.

No. 14 (R. 187-8) instructed the jury that the test of whether plaintiff was engaged in interstate commerce was whether he was (a) employed by and was at work for the defendant in interstate commerce, or (b) in work so closely related to such commerce as to be practically a part of it.

This court has very patiently and persistently pointed out, in the *Shanks* case and the many cases following it, that that is not the true test. *Shanks v. D. L. & W.*, 239 U. S. 556, 558. In them it is always said that the *true test of employment in such commerce in the sense intended is*, "was the employe * * * engaged in interstate *transportation* or in work so closely related to *it* as to be practically a part of it."

The instruction told the jury that the test of whether plaintiff's work was in interstate commerce is whether it was in interstate commerce, which is, of course, wholly meaningless, or "in work so closely related to *such commerce*," etc., which is not the true test. If it were, the test would enlarge the scope of the Act, which provides that the work must be in interstate commerce—*not practically a part of it, but in it.*

No. 15 (R. 188) was a similar paraphrase of the test, but using the word "substantially" instead of "practically" in the second part of it, and was to that degree additionally improper. When a paraphrase is used it should be exactly and not varied by similar [illegible] the original.

No. 24 (R. 156) was also a corrupted and erroneous paraphrase of the *Shanks case test*, but much worse than the two above referred to. It told the jury that plaintiff's work was in interstate *commerce* if it were "*performing a service for the defendant which was reasonably necessary in aid and furtherance of interstate commerce.*"

In Industrial Comm. v. Davis, 259 U. S. 182, 186, 187, the *Shanks case test* is quoted and adopted, and it is carefully explained that employes may not be within the Act even when performing work in shops which are accessories to interstate commerce and necessary to it, for all employes of interstate railroads are necessary to such movement, but that they are only within the Liability Act when within the "*transportation*" test, which is the true test.

The instruction complained of, in the light of these decisions, is not only incorrect, but almost meaningless, and well calculated to and undoubtedly did mislead the jury, especially when coupled with counsel's argument to the jury that the word "*transportation*" is not to be found in the Act and that the court would so instruct, etc. (R. 185).

I.

Error in Overruling Objections to and Allowing Misstatements of Facts to be made to the Jury.

One of the witnesses for plaintiff was McMenamin, defendant's switch foreman in charge of the movement of the engine to and from the coal-chute. Negligence was charged against the defendant for moving the engine at the time in question without first ringing a bell. *McMenamin was not asked and did not testify with reference to that matter.* Plaintiff's counsel, in his argument to the jury, stated that McMenamin had testified that the bell was not rung.* Defendant's counsel objected to the mis-statement and the trial judge stated that he did not remember that the witness had so testified, whereupon plaintiff's counsel again and emphatically stated that he had, and defendant's counsel again objected, but was overruled (R. 160, 161). The testimony was being taken by the court's official reporter, but he was not consulted, and the court, over defendant's objections, allowed counsel to argue, again and again, and to repeatedly state positively that [illegible]man had so testified (R. 161-2). The record was duly protected in accordance with the Illinois *practice and the alleged error was passed upon by the Appellate Court adversely to defendant. The only testimony that the bell was not rung was that of plaintiff himself, which was negative and so weak as not to amount to even a scintilla of evidence. (R. 39, 40, 48). Added importance is given this error and the error of the Appellate Court's holding with reference to it by the Appellate Court's decision on the question of assumption of risk, to the effect that it had been *customary* to ring a bell and that *therefore* plaintiff did not assume the risk caused by a failure *to follow such custom*; 258 Ill. App. 545, commencing at bottom of page 556, and especially the case supposed to govern, *[illegible] v. Ill. Cent.*, 200 Ill. App. 113, 115 (R. 178-9), and the quotations, commencing with the last paragraph on page 557, from that case. The Appellate Court (*top of p. 557*) says:

> "The testimony on the part of appellee [plaintiff] is to the effect that no warning, by the ringing of a bell or otherwise, was given prior to the movement of

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*"It was not necessary to constantly interrupt counsel and repeat the same objection after a ruling had once been obtained. Such conduct on the part of counsel for defendant would have been improper, and no right was lost by failing to adopt such a course." *Chicago, &c. v. [illegible]*, 216 Ill. 176, 180.

[illegible] which resulted in his injury. The evid [illegible] on behalf of [illegible] was to the effect that the [illegible] It was therefore a question for the jury as [illegible] whether [illegible] bell was rung or other warning given. [illegible]

In view of the above quotation we fail to understand h that court could come to the conclusion that the error o the trial court in overruling defendant's objections a allowing counsel to make and repeat the misstatements th question was other than highly prejudicial to defenda The plaintiff's right to recover, if he had any, depend upon the claim that a bell was not rung before the mo [illegible] question was [illegible]. There can be no doubt th that the argument complained of convinced the jury th [illegible], the man in charge of the engines, testified th the bell was not rung. In the Appellate Court counsel f plaintiff conceded that the witness did not so testify (R [illegible]), and such is the fact.

Conclusion.

It is, therefore, respectfully submitted that this case i one calling for the exercise by this Court of its supervisor powers, in order that justice may be done in this ca and that a confusing situation in the courts of the Sta of Illinois may be cleared up; and that to such an end writ of certiorari should be granted and this Court shou review the decision of the Appellate Court of Illino Second Division, and finally reverse it.

Ray N. Van Doren,
[illegible] H. [illegible],
Counsel for Petitio

[illegible],
Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1931.

No. 60
(Docket No. 917)

Chicago and North Western Railway Company,
Petitioner,

vs.

Eugene Bolle,
Respondent.

PETITIONER'S BRIEF.

Ray N. Van Doren,
Samuel H. Cady,
Counsel for Petitioner.

Nelson J. Wilcox,
Of Counsel.

[illegible]

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Illinois Central v. Cousins, 241 U. S. 641
11, 13, 14, 17, 30, [illegible]
Industrial Comm. v. Davis, 259 U. S. 182 [illegible]

Johnston v. C. & N. W., 226 N. W. (Ia.) 357 40
Jud. Code, sec. 237 (344) 1

Kinzell v. C. M. & St. P., 250 U. S. 130 [illegible]

Lehigh Valley, etc. v. Barlow, 244 U. S. 183 22
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Milwaukee, etc. v. Kellogg, 94 U. S. 469 [illegible]
Minneapolis, etc. v. Nash, 242 U. S. 619
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N. Y. Cent. v. White, 243 U. S. 188 [illegible]
North Carolina, etc. v. Zachary, 232 U. S. 248 [illegible]

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SUPREME COURT OF THE UNITED STATES

No. 60, October Term, A. D. 1931.

Chicago and North Western Railway Company,
Petitioner,
vs.
Herman Bolle,
Respondent.

PETITIONER'S BRIEF.

I.

Opinion of the Court Below.

The opinion in the Appellate Court of Illinois, Second District, is reported in *Bolle v. Chicago and North Western Railway Company*, 258 Ill. App. 549.

II.

Jurisdiction.

1. Respondent's cause of action, if any, and petitioner's defenses, if any, depend upon the provisions of 35 Stat. 65, ch. 149 (U. S. C., Tit. 45, secs. 51-59), known as the Federal Employers' Liability Act.

A final judgment has been rendered or passed by the highest court of Illinois in which a decision could be had involving rights, privileges and immunities specially set up and claimed by both parties under the Constitution and a statute (35 Stat. 65) of the United States, and this court has jurisdiction to review by virtue of sec. 344 (Judicial Code, sec. 237, as amended), U. S. C. A. 28.

2. The date of the judgment to be reviewed is September 23, 1930 (R. 141-2). The Appellate Court had entered a judgment and opinion on an earlier date (R. 126-7), but, on petitioner's motion for a rehearing, struck it from the files and entered a new judgment and opinion on said date, and denied the motion (R. 137-8-142).

Thereafter petitioner duly applied to said Appellate Court for a certificate of importance to the Supreme Court of Illinois, under ch. 110, par. 120, Cahill's R. S. Ill.; but the court, on October 3, 1930, denied the application (R. 142-3).

Thereafter petitioner duly applied to the Supreme Court of Illinois for a writ of certiorari to review said cause and said decision and judgment of the Appellate Court, but said Supreme Court denied the application by order duly entered on February 17, 1931 (R. 145-6).

Thereafter petitioner duly filed in this Court its application for a writ of certiorari to the Appellate Court of Illinois, Second District, which was granted June 1, 1931. 51 Sup. Ct. Rep. 655.

3. The nature of the case and the rulings below are such as to bring the case within the jurisdictional provision relied on.

4. Cases believed to sustain the jurisdiction:

St. Louis, etc. v. McWhirter, 229 U. S. 265.

Seaboard Air Line v. Horton, 233 U. S. 492, 499.

American Ry. Express Co. v. Levee, 263 U. S. 19, 21.

Minneapolis, etc. R. Co. v. Rock, 279 U. S. 410, 412.

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*The references to "R." are to the Transcript of Record, printed by the Clerk of this Court, [illegible]

III

Statement of the Case

Plaintiff (respondent) then twenty-two years old and without railroad experience, was hired by defendant (petitioner) to fire a heating plant in its railroad's roundhouse at Waukegan, Illinois (R. 16). This heating plant was connected by permanently placed underground pipes with and heated, sometimes, suburban coaches and a turntable, the roundhouse, passenger depot, baggage room, foreman's office, a register room, bunk car, carpenter shop and maintenance of way car (R. 61-2, 86-7), all except the coaches being stationary buildings (R. 62). The central unit of the plant consisted at times of a stationary boiler or furnace, and at other times of a locomotive substituting therefor. He went to work November 18, 1952 (R. 17), and his first five days the locomotive (heater-engine) was the central unit of the plant and he fired it (R. 59). Thereafter for several days the furnace was used, and then again, the day before and the day of the accident, December 4, 1952, the locomotive (R. 60). When firing the furnace plaintiff shoveled the coal into its firebox from a nearby bin. When the locomotive was used its coal supply was in the bin in its tender and had to be replenished from time to time by hauling the locomotive to the coal-chutes at Beach, Illinois, in the Waukegan yards, about four miles from the roundhouse. Each night the Waukegan yard and switching locomotives, or some of them, went to these chutes to be coaled, and they were used to haul the heater-engine from the roundhouse to the chutes and back (R. 40). The evening of the accident, the heater-engine needed coal, and it was taken out of the roundhouse by other engines, and coupled to these active locomotives and was by them hauled to the chutes, plaintiff accompanying it to keep its fire going (R. 19, 32, 33, 43, 40). It was after 9:30 P. M. (R. 18). On the way, but before reaching the chutes, water was taken into one or two of the locomotives, plaintiff assisting in putting water into the heater-engine, which operation was interrupted and he got back in the cab and stayed there while the engines were side-tracked to let a train go by. Thereafter the engines were moved out of the side-track and again started towards the chutes, whereupon plaintiff got up on top of the heater-engine and stood on the rim of the coal-bin, just back of the cab, and rode there, hanging onto the roof of the cab, during the rest of the movements, and was there in that place when he got hurt. His explanation of *why* he got up to and so rode in that place is that he thought they were to take more water into the heater-engine, but he admits, and it is the fact, that he could not, and that he knew that he could not, take water into the engine from that place. There was no reason whatever for his being there (R. 19-22, 26-8, 29). After the engines got to the chutes two of them were coaled by and under the directions of "the coal-chute man" (R. 45), not an employe of defendant (R. 44-5, 37-8). While this was going on plaintiff stood on the rim of the coal-bin of the heater-engine. It was dark, the chutes were not lighted and he had no lantern (R. 20-1, 30). He says that after the second "spotting" he saw a man he thought was his straw-boss Tony on the next engine reach up and pull down a slide, so he did the same, pulling down a slide into the tender of the heater-engine, so that he then was between the slide and the cab (R. 30-33). Then the engines were again moved and he was caught and injured (R. 20-1). He testified that at no time prior to the accident were any signals of any kind given, although many backward and forward movements were made; he saw none given by anybody, and heard none, which he explained by [illegible] saying "I wasn't paying any attention" (R. 29, 30). There was no other evidence in the case on the subject of lack of signals. The man operating the engine which moved the others testified that he rang the bell before each of the various movements (R. 70, 72, 74), and of course all of the movements back and forth through the switches were controlled and made on lantern or other signals, and the uncontradicted evidence is that all of the movements approaching and at the chutes were made on the loud oral instructions (R. 44-5, 74) of the "coal-chute man." No coal was taken after the accident and three engines had been coaled before it happened (R. 47).

Plaintiff had never before seen the side of a coal chute from which the coal is taken and had no knowledge of how they worked (R. 25-6). The coal-bin of the heater-engine is in the front end of the tender just back of the cab and in front of the water tank (R. 27). Water is taken into the boiler of any locomotive through a hole in the top of its tank, at a place remote from the cab and to the rear of the coal-bin (R. 28-9). To get from the place where plaintiff rode, hanging onto the cab roof, to the place to take water into the heater-engine he would have to get down into the front end of the coal-bin and then go across the length of it to and climb up the back end of it (R. 34-5).

Plaintiff testified:

> "On all of this whole trip, from the roundhouse until I got hurt, my engine was just being hauled or pushed by the other engines. I didn't know anything about operating it. The power wasn't connected up on my engine at any time on the trip from the roundhouse up to Beach" (R. 33).

No member of the switch crew would be endangered by a movement of the engines, and plaintiff was supposed to be and should have been in the cab of the heater-engine

(R. 22-77). Whether the [illegible] nature of [illegible] of the engineer at the time in question would be [illegible] for the [illegible] (R. [illegible] 76-77) [illegible] the [illegible] part of [illegible]

This suit was brought by respondent (plaintiff) against petitioner (defendant) under the Federal Employers' Liability Act to recover damages for his injuries. The case was first tried in 1938 in the Circuit Court of Lake County, Illinois, and he was given a verdict for $30,000.00. On petitioner's appeal to the Appellate Court of Illinois, Second District, the judgment on that verdict was reversed, and the cause ordered to be remanded, on the ground that plaintiff was not at the time of his injury engaged in interstate commerce; no other alleged error being considered or decided. The plaintiff moved that the remanding part of said order be vacated so that he might take action in the Supreme Court of Illinois [illegible], which motion was granted [illegible]. (Bole v. C. & N. W. Ry. Co., [illegible]). The Supreme Court of Illinois reversed the judgment of the Appellate Court and remanded the cause to that court with instructions to either affirm the trial court's judgment or remand the case for a new trial, holding that the question whether the facts brought plaintiff within the Liability Act was for determination by the jury as a question of fact. *Bole v. C. & N. W. Ry. Co.*, [illegible] Ill. [illegible]. Thereupon the Appellate Court refused to affirm the trial court judgment, but obeyed the instructions of the Supreme Court [illegible] again [illegible] in its opinion that plaintiff was not engaged in interstate commerce) by remanding the cause to the trial court. *Bole v. C. & N. W. Ry. Co.*, [illegible] Ill. App. 31, 35. Another trial was had in the Circuit Court of Lake County (but before a different judge), at the close of which the court directed a verdict for defendant on the ground that, as a matter of law, plaintiff, at the time of his injury, was not engaged in interstate commerce. Plaintiff appealed to the Appellate Court and that court (261 Ill. App. [illegible], opinion not published) reversed and remanded on the ground that the Supreme Court of Illinois had held (324 Ill. 479), in the same case and on substantially the same facts, that the interstate commerce question was for the jury, which decision was binding on it. The case was again tried and plaintiff had a verdict and judgment for $37,500.00 which judgment was affirmed by the Appellate Court, *Bolle v. C. & N. W. Ry. Co.*, 262 Ill. App. 545, on both the interstate commerce feature and the merits, which is the judgment here for review. As to the interstate commerce feature the decision follows that of the Supreme Court of Illinois, namely: That the question was one of fact for the jury, and that therefore the verdict could not be disturbed unless it was contrary to the manifest weight of the evidence.

There is no dispute as to the facts bearing on the question of the purpose of or as to what plaintiff was doing at the time of his injury: He was putting coal into a bin, which was a part of the heater-engine, from whence he later would shovel it into the firebox of this heating-plant for the purpose of generating steam, to be transmitted through permanently placed pipes to, and when thereat desired by others, heat buildings and offices and sometimes intrastate suburban coaches.

As to the character of plaintiff's work at the time of his injury, whether interstate or not, the situation is exactly the same as though the so-called *stationary boiler* or heating-plant, with its coal-bin, had been installed and maintained on a flat-car in the roundhouse, and such flat-car hauled to the chutes to fill its coal-bin, plaintiff riding it to keep the fire alive, and being hurt while putting coal into the bin from the chutes. The fact that the heating-plant in use at the time in question happened to be a locomotive in no way affects that question.

There have been three court decisions that plaintiff was not engaged in interstate commerce and two that the question whether the undisputed facts brought him within the Liability Act was for the jury. There has been no decision by any court that he was so engaged.

The decision of the Appellate Court, forced by the decision of the State Supreme Court, makes it the law of Illinois in suits brought under the Federal Employer's Liability Act, even when the facts as to and the purpose of what the employe was doing at the time of his injury are undisputed or even stipulated, that the question whether such facts bring the parties within the Liability Act is for ultimate determination by the jury; that the jury's determination of it may not be disturbed unless

> "the evidence in the case was not such that all reasonable minds must necessarily agree that at the time of the accident plaintiff's employment was not such as to bring him within the provisions of the Federal Employers' Liability Act."

And this, although this Court, on identical or similar facts, may have held that the Act did not apply.

In its opinion, 258 Ill. App. 545, the Appellate Court quotes and adopts the Illinois Supreme Court's statement of the facts, which included many irrelevant facts (258 Ill. App. 551); and quotes, adopts and adds to that court's statement of the law (258 Ill. App. 553), as follows:

> "Whenever an issue is made in a case, and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony, or the evidence may be agreed upon or embodied in a stipulation of fact."

In the Appellate Court's opinion no mention is made of the line of authorities actually applicable, although they were submitted to that court in petitioner's brief therein.

IV.

Errors Intended to Be Urged.

1. The trial court should have granted defendant's motion (R. 96) and instructed the jury to return a verdict in favor of defendant, and the Appellate Court should have so held.

2. On the undisputed evidence as to what plaintiff was doing at the time of his injury he was not within the Federal Employers' Liability Act.

3. The question whether the facts brought plaintiff within the Liability Act was one of law for the court.

4. No actionable negligence of defendant was proved.

5. Plaintiff assumed the risk.

6. Plaintiff's own negligence was either the sole or a contributing proximate cause of his injury.

7. The trial court admitted improper evidence over defendant's objections.

8. The trial court allowed misstatements of the evidence to be made to the jury over defendant's objections.

9. The trial court improperly instructed the jury and improperly refused to give instructions duly requested by defendant.

10. Excessive damages were awarded, due to improper instructions on the subject and to passion and prejudice of the jury.

All of the foregoing errors, with others, were properly assigned in the Appellate Court (R. 119-123).

V.

Argument.

A. Plaintiff not within the Liability Act.

B. On undisputed facts showing what the employe was doing, and the purpose of it, whether he comes within the Act is a question of law.

C. No negligence on part of defendant.

D. Plaintiff a volunteer.

E. Plaintiff negligent.

F. Plaintiff assumed the risk.

G. Improper evidence admitted.

H. Erroneous refusals to give proper instructions and erroneous instructions given to the jury.

I. Improper argument to jury allowed over defendant's objections.

J. Excessive damages; improper instruction on damages.

K. Reply to respondent's contentions.

A.

The respondent has no cause of action under the Federal Employers' Act, because he was not engaged in Interstate Commerce at the time of his injury.

D. L. & W. v. Yurkonis, 238 U. S. 439.
Shanks v. D. L. & W., 239 U. S. 556.
C. B. & Q. v. Harrington, 241 U. S. 177, 180.
Illinois Central v. Cousins, 241 U. S. 641.
M. & St. L. v. Nash, 242 U. S. 619.
B. & O. v. Branson, 242 U. S. [illegible].
Hood v. [illegible], [illegible].
Great Northern v. King, 161 N. W. (Wis.) 371.

"The true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate TRANSPORTATION or in work so CLOSELY related to IT as to be practically a part of IT."

Shanks v. D. L. & W., 239 U. S. 556, 558.

The *Shanks case* was decided in *January*, 1916, and this court has consistently ever since adhered to that test.

The relation to interstate transportation, which is the second or alternative part of the test, must be close and direct.

C. B. & Q. v. Harrington, 241 U. S. 177, 180.

There can here be no contention that plaintiff was "at the time of his injury engaged *in* interstate transportation," and it follows that unless he was engaged "in work so closely related to it [interstate transportation] as to be practically a part of it [interstate transportation]" he was not within the *Act* because the *facts* do not satisfy the test.

That the *Shanks case* test, when applied *to the facts* in this case, demonstrates our proposition seems *clear from* the decisions of this court in cases involving similar *facts*.

As was said by the Appellate Court *of* Illinois in its first two decisions, this case is indistinguishable on *facts* and law from *this* Court's decision in *Illinois Central v. Cousins*, 241 U. S. 641, reversing the Supreme Court *of* Minnesota's affirmance *of* a judgment *for* damages *for* personal injuries sustained by an employee while he was wheeling a barrow of coal to the *railway* company's repair shops *for* use in stoves which heated such shops, and in which shops other employees repaired interstate equipment and were within the second part *of* the *Shanks case* test. The trial court had held as a matter of law that Cousins *was* engaged in interstate commerce, and the Minnesota Supreme Court had affirmed (*Cousins v. Ill. Cent.*, 126 Minn. 172) believing that the *Pedersen case* (229 U. S. 146) governed and on the theory that because the men in the shops were engaged in interstate commerce Cousins also was so engaged while getting coal to heat the shops, saying: "The repairs could not be made unless the shop was heated." The reversal by this Court, by *per curiam* decision, was "upon authority of" this Court's decision in the *Yurkonis* (238 U. S. 439) and *Shanks* (239 U. S. 556) *cases*, in which it was held that the work of the employe was too remote from interstate transportation to "be practically a part of it."

In the *Yurkonis case, supra*, the employe was mining coal, thereafter to be used in engines engaged in interstate transportation.

In the *Shanks case, supra*, the employe was changing the location of a shaft that communicated motive power to machinery used to repair interstate locomotives in the shop provided for that purpose. *Usually* his work consisted in repairing such locomotives. This Court held that his usual work was immaterial, and that he was not engaged in interstate commerce while changing the location of the shaft.

In the case at bar, the decision below is partly based upon evidence that plaintiff, when not firing the heating-plant or getting coal for it, sometimes performed such work as "watching engines in the roundhouse, turning turn-tables, and other duties in the roundhouse with reference to engines engaged in both interstate and intrastate commerce." The State Supreme Court included those facts in its statement of facts (324 Ill. 479, 480) and the Appellate Court quoted and adopted them as its statement of the facts (258 Ill. App. 545, 551). In other words, the Illinois courts hold that this jury verdict properly overrules this court's decision in the *Shanks* case. The case at bar is weaker for the employe than that case, for here plaintiff's regular employment was that of janitor of the heating-plant and the other work he did was incidental or occasional and performed only when Tony, his straw-boss, was occasionally absent from the roundhouse for short times (R. [illegible]).

That it was plain error to consider as determinative of the question of the character of plaintiff's work any evidence except that bearing on the service he was performing when hurt, is beyond question.

Shanks v. D. L. & W., 239 U. S. 556.

Congress had the *power* to regulate the liability of carriers for injuries to employes engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time, isolatedly considered, is in interstate or intrastate commerce, but it did not exercise that power but confined the liability to injuries occurring to employes when the particular service in which they are employed at the time of injury is a part of interstate commerce.

Illinois Central v. Behrens, 233 U. S. 473-7, 8.

This jury verdict is held by the court below to properly overrule *this* Court's decision in the *Cousins case*, *supra*, for it is based upon the *fact* that the heat from the roundhouse heating-plant warmed buildings in which *other* employees were engaged in interstate commerce. See decision of the Illinois Supreme Court, 324 Ill. 479, 481; and of the Appellate Court, adopting the *same statement of* facts, 258 Ill. App. 545, 551.

In the case at bar the jury were allowed to consider the facts that the roundhouse heating-plant heated the passenger depot as determinative of the character of plaintiff's work. And this although petitioner duly requested the trial court to instruct the jury that the heating of the depot could not be so considered. This was a further overruling of the decisions of this court.

In *M. & St. L. R. R. Co. v. Nash*, 242 U. S. 619, this court reversed the Supreme Court of Minnesota in a case in which the employe was injured while engaged in transporting an outhouse to a station where it was to be installed for the convenience of interstate employes and passengers. The Minnesota court held that Nash was engaged in interstate commerce, because:

> "The station buildings and the outhouses connected therewith are provided for the accommodation of interstate as well as intrastate passengers, and are unquestionably used in connection with interstate commerce." ([illegible] N. W. [illegible])

But this court reversed, by *per curiam* decision, upon the authority of the *Yurkonis* (238 U. S. 439), *Shanks* (239 U. S. 556) and *Harrington* (241 U. S. 177-180) cases, citing also the Cousins case, 241 U. S. 641.

There can be no difference in legal effect between the convenience of heat and toilet furnished in passenger depots. The work of the employes in connection with furnishing the warmth and such other comforts has no relation to interstate transportation. There are several decisions by State courts that employes, while building fires in heating plants or stoves in depot buildings, shops and offices, are not engaged in interstate commerce.

[illegible] v. [illegible], [illegible] Ill. [illegible], 606-7.
[illegible] v. [illegible], [illegible] Pac. (Kan.) [illegible], 740-2.
[illegible] v. [illegible], 168 N. W. (Wis.) 371, 372.

Attention is called to certain arguments of plaintiff's counsel to the jury on the interstate commerce feature of the case (R. [illegible]). They show how plaintiff's counsel was able to and did take advantage of these errors of the trial court. They emphasize and demonstrate that the errors were highly prejudicial. He argued, among other things, as follows:

1. That if the heating plant heated nothing but the passenger depot, plaintiff was engaged in interstate commerce in hauling coal to and firing such plant, "for the convenience and comfort of their passengers" and the employes in the depot "taking care of their interstate business."

2. That "Bolle was supplying heat *to* this passenger station, where its interstate passengers were conveniently accommodated, and where they sold tickets and transmitted messages and carried on business that took care of the interstate commerce of the *defendant*."

There is a distinct line of authorities by this Court in which this case belongs. *They are cited under the caption* of this part of this brief. *Not one of them is cited or referred to* and they are wholly ignored in the opinion below.

The decision and opinion of the Appellate Court when the case was first before it was right, and that opinion was refiled and re-entered by that court after the decision by the Supreme Court of Illinois. On the second trial the trial court ruled that the decisions of *this Court* governed, rather than the unhappy decision of the Supreme Court of Illinois, and directed a verdict in favor of the defendant. It is only *fair* to the Appellate Court to say that it probably is of the same opinion now as at the time of its two former opinions (i. e. 223 Ill. App. 260; 246 Ill. App. 21; 251 Ill. App. 623). In its *filed* but not published opinion of January 21, 1921, 251 Ill. App. 623—when the case was before it on plaintiff's appeal from the directed verdict, the Appellate Court said:

> "The action of the trial judge in directing a verdict in favor of appellee was based upon his conclusion

> that the appellant was not engaged in interstate commerce when he was injured. When the case was before us on the former appeal, we reached the same conclusion and so expressed it. However, the Supreme Court took a different view * * * It would seem to follow as a logical conclusion that if the Appellate Court erred in holding the plaintiff was not engaged in interstate commerce, then the trial court erred in holding that he was not so engaged. *The Supreme Court held the question was one of fact to be submitted to a jury. It is therefore necessary to reverse and remand the cause so that the issue may be tried by a jury.*"

Bolle's work had no close and direct relation, or any relation, to interstate transportation.

> *Chicago, B. & Q. R. Co.* v. *Harrington*, 241 U. S. 177, 180.

Bolle's work merely created a supply of steam, which other employes tapped as necessity produced by changes in the temperature required or in the individual opinions of those other employes seemed to require. His work produced nothing but that supply or reserve of steam, and never, in any circumstances, was a pound of it used to move anything or to aid in the transportation of anything. He operated nothing, and the steam his fire created operated nothing. His work was not so closely related to interstate transportation as was the work of *Yurkonis*, the miner, who produced coal, an essential to the movement of the interstate engines in which it was used; or the work of *Harrington*, the switchman, who was moving cars of coal to the chutes from which it would go into and furnish motive power to interstate engines and trains; or of *Shanks*, the mechanic who repaired interstate engines, while changing the location of the shaft that transmitted power to the engine-repairing machinery; or of *Branson*, the painter, who was painting the actual instrumentalities (cars and engines) of interstate transportation; or of *Collins*, the pump operator, who pumped the water that was as essential to the actual movement of interstate engines and trains; or of *Szary*, the sand-man, who dried the sand and put it into the interstate engines so they could be properly and safely operated; or of any other employe held by this Court to be without the Act, except *Guzine*, the laborer, who was wheeling the coal to the stoves which warmed the shop in which other employes repaired the primary instrumentalities of interstate transportation.

Bolle moved nothing in commerce of any kind. He operated no instrumentality that moved anything. He did no work that had any relation to the movement of anything. He did no work in connection with any instrumentality that had any relation to the movement of anything. His work created no motive power and had no relation to motive power or its creation. The instrumentality in connection with which he worked created nothing that was used as or for motive power. His work neither expedited nor interfered in any way with any kind of transportation. He built a fire and kept it going in the firebox of a plant that generated steam for use solely as heat. He hadn't even anything to do with the use or application of the steam as heat. He had no connection with the use of the steam he produced. Others turned it on and off as required at the ends of the pipes remote from the furnace. Plaintiff's only duties and only work were to shovel coal into the fire box, watch the steam and water gauges, turn a valve to let water in when low, blow off the steam when too much, and, when the heater-engine was being used, *accompany* it to and from the coal-chutes. This involved no transportation or any relation to transportation.

Review of this Court's Decisions, with Comments.

Because of the contention for respondent that this Court did not mean what it said in the *Shanks* case, and that this is demonstrated by its other decisions, we believe that we are justified in the submission herein of the following review. We hope that it may at least furnish to the Court a convenient and helpful reference to the decided cases. With few exceptions we have in this brief refrained from citing or calling attention to decisions of courts other than this Court, believing the latter sufficient to a correct decision here.

After the decision upholding the validity of the Act, *Second Employers' Liability Cases*, 223 U. S. 1, January 15, 1912, the first case to come to this court for a determination of the question whether under the facts the employe came within the Act was *Pedersen* v. *D. L. & W. R. R.*, 229 U. S. 146, decided May 26, 1913. It involved an employe of an interstate railroad hurt while he was carrying bolts to and to be used by him in repairing a bridge then and there regularly used by interstate trains. It was held that as the bridge was in use at the time of Pedersen's injury it was an *instrumentality* of interstate commerce and that work in repairing it was work in such commerce, and the Court said (p. 151):

> "that the work of keeping **such* instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in *legal contemplation* a part of it."

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*In most of the quotations in this brief the italics are ours.

And the Court also said (p. 152):

> "The true test always is: Is the work in question *a part* of the interstate commerce in which the carrier is engaged?"

In the course of the opinion it was also said (p. 151):

> "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

Since the *Pedersen case, supra,* this Court has passed upon whether the facts brought the Act into play in the following cases:

St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, decided the same day as the *Pedersen case,* involved a *yard clerk* hurt while passing through the yard towards and examining and recording car numbers and seals of an incoming interstate train. It was held that his work was directly and immediately connected with "*the movement of interstate freight*" and therefore within the act; that "the interstate *transportation* was not ended merely because that yard was a terminal for that train;" that the breaking up of a train at a terminal was "as much *a part of the interstate transportation* as was the movement across the state line."

North Carolina R. R. Co. v. Zachary, 232 U. S. 248, decided February 2, 1914, involved a *locomotive fireman* killed while preparing his engine for hauling a train that when made up would contain cars from another state on their way to the destination of said train. It was held that the employe's work of preparation was *a part* of the interstate commerce, and that the hauling of cars from one State to another, even if empty, is interstate commerce.

Illinois Central R. R. Co. v. *Behrens*, 233 U. S. 473, decided April 27, 1914, involved a locomotive *fireman* killed while his switch engine was moving cars loaded with freight which was wholly intrastate from one part of a yard to another. The case was certified to this court under section 239 of the Judicial Code for instruction upon the question of law as to whether, on the facts stated in the certificate, the employe at the time of his injury was employed in interstate commerce within the meaning of the Employers' Liability Act. It was held that he was not; that (p. 478) the Act was confined "to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce." As the man was actually engaged in transportation the only question was whether it was interstate or intrastate.

New York Central, etc. v. *Carr*, 238 U. S. 260, decided June 14, 1915, involved a *freight* brakeman hurt while cutting an intrastate car out of his interstate train at an intermediate station. It was held that (p. 263) the particular act in which he was engaged when hurt was part of his work on the interstate train and that he was within the Act, distinguishing the *Behrens* case, 233 U. S. 473.

Delaware, L. & W. R. R. Co. v. *Yurkonis*, 238 U. S. 439, decided June 21, 1915, involved a *coal miner* hurt while mining coal for use in locomotives engaged in interstate transportation. It was held that the employment was too remote from the commerce to be a *part* of it. Commencing at the bottom of p. 444 the court said:

"The mere fact that the coal might be or was intended to be used in the conduct of interstate comments after the same was [illegible] and [illegible] did not make the injury one received by the employee while he was engaged in interstate commerce.

Pennsylvania Co. v. Donat, 239 U. S. 50, decided November 1, 1915, involved a yard switchman hurt while moving two loaded cars coming from another state to their destination on company's private track connected with the yard. It was held that the appeal was frivolous, and judgment in favor of plaintiff was affirmed by memorandum opinion; that evidence tending to show an uncoupling of the engine from the loaded cars and with it to remove two empty cars from the industry track made the question whether the purpose of the movement was to deliver the loaded cars proper for submission to the jury.

Chicago & Rock Island R. R. v. Devine, 239 U. S. 52, decided November 8, 1915, was another appeal held to be wanting in substance, and the judgment for plaintiff below was affirmed by memorandum opinion. The case involved (266 Ill. 248) a *switchman* killed while engaged in the movement of a *freight train* in which, it appeared from the testimony of the conductor, there were cars from without the state and others on their way out.

Great Northern Ry. Co. v. Otos, 239 U. S. 349, decided December 13, 1915, involved a *switch foreman* injured in switching an interstate car while it was being slightly delayed for repairs while in transit to its destination. It was held that the delay was not a withdrawal from commerce and plaintiff was therefore within the Act.

Seaboard Air Line v. Koennecke, 239 U. S. 352, decided December 13, 1915, involved a switchman killed while "engaged in distributing the cars from an interstate train and clearing the track for another interstate train;" it was held that he was within the Act.

Southern Ry. Co. v. Lloyd, 239 U. S. 496, decided Jan. 10, 1916, involved a *locomotive engineer* hurt while oiling and inspecting his engine for an interstate trip. It was held that (p. 501) it was not error for the trial court to submit the interstate commerce question to the jury as part of a special verdict covering the issues.

Chicago, Rock Island, etc. v. Wright, 239 U. S. 548, decided January 10, 1916, involved a *locomotive engineer* killed while operating his lone engine on a trip from a point in Kansas to a point in Iowa. It was held that (p. 550) although his engine was not in commercial use, but merely on its way to a repair shop, the fact that the trip was from one state to another brought the engineer within the Act.

Then the Shanks Case.

Shanks v. Delaware, L. & W. R. R. Co., 239 U. S. 556, decided January 10, 1916, involved a *mechanic* in a locomotive repair shop hurt while moving from one location to another in the shop a countershaft which supplied power to a shaping machine which it was plaintiff's principal duty to operate and on which he shaped parts used by him in the repair of locomotives used in interstate commerce. He got a judgment in the trial court, which was reversed by the Appellate Division (148 N. Y. Supp. 1034), which reversal was affirmed by the Court of Appeals (214 N. Y. 413; 108 N. E. 644), saying:

> "Unless some reasonable and practical limit and boundary is prescribed in acts constituting employment in interstate commerce, every act that can be shown to have affected interstate commerce in a remote degree is included within the terms of the statute. The decision in the Pedersen case has been frequently referred to as extending the provisions of the act to the limit of legislative intention, and we think it should not be by us further extended."

Two of the justices of the Court of Appeals dissented, and in their opinion (108 N. E., p. 646) said (p. 647):

> "The work of repairing the shaping machine was not *independent* of interstate commerce. It was essential to the carrying on of that commerce. The work of putting that machine in order so that it could be used in the repair of locomotives engaged in interstate commerce was just as much an act of interstate commerce as if the work had been done upon such a locomotive. The work in which the plaintiff was engaged was, as the United States Supreme Court said in the Pedersen case, * * * 'so closely related to such commerce as to be in practice and in legal contemplation a part of it.'"

The dissenting justices then quoted from the opinion in the *Pedersen* case and said:

> "Without this machine the locomotives engaged in interstate commerce could not have been repaired and put in a condition to be used in such commerce. It may have been minor work, but it was none the less an essential part of the larger work of putting in repair locomotives engaged in interstate commerce. The Pedersen case, supra seems to me to sustain the contention of the plaintiff that at the time of the accident he was engaged in interstate commerce."

The dissenting opinion then cites and quotes from *Barlow v. Lehigh Valley R. R. Co.*, 214 N. Y. 116, 119; 107 N. E. 814, in which the Court of Appeals had then recently held that a switchman was within the *Act* while placing cars containing company coal on an unloading trestle in the yards several days *after* the ending of an interstate trip. The decision in that case (*Barlow, supra*) also was upon the supposed authority of the *Pedersen* case. But later this Court reversed the judgment upon the authority of *C. B. & Q. R. R. Co. v. Harrington*, 241 U. S. 177. *Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183, 184.

The *Shanks* case came from the state court to this Court exemplifying the necessity for a more definite test than had been provided by the *earlier* cases. Counsel for injured employes had seized upon "the questions which naturally arise in this connection," which are mentioned in the *Pedersen* opinion, and had convinced several of the lower courts, both State and Federal, that *all* employes of interstate railroads came within the act *unless their work was entirely independent of the employer's interstate business.*

What this Court did and said in the *Shanks* case and the test it therein laid down should have completely cleared the situation, but, unfortunately, it has not, as is exemplified by the case at bar, although it was of immense help in many quarters. The present trouble seems to us to be that *this* Court has not yet specifically denied or repudiated, in words, the tremendously elastic *application* made of some of the language of the *Pedersen* opinion.

The decision of this Court in the *Shanks* case definitely states that the line of demarcation between employes of interstate railroads within and without the Act is *interstate transportation;* states it with plain intention, deliberately, and makes it the *test* for all cases in which the question arises. After quoting the relevant words of the Act the opinion, p. 557, says:

> "And so it results where the carrier is also engaged in intrastate commerce or in what is not commerce at all, that one while employed therein by the carrier suffers injury through its negligence * * * must look for redress to the laws of the State wherein the injury occurs," etc.

After a brief statement of the facts, and narrowin down to what Shanks was doing at the time of his jury and excluding his usual work of repairing engi as immaterial because the Act refers to the service being rendered when the injury was suffered, the opinion, p. 558, says:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate *commerce*, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *United States*, 196 U. S. 375, 398), and that the true test of employment in such *commerce* in the sense intended is, was the employe at the time of the injury engaged in interstate *transportation* or in work so closely related to *it* as to be practically a part of *it*."

After a brief review of six of its decisions in which this Court held employes within the Act, and of two in which it held that they were not, the opinion, commencing at the bottom of p. 559, says:

> "Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate *transportation*, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument *then in use in such transportation*. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate *transportation* was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such *transportation*. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis case*, was too remote from interstate *transportation* to be practically a part of it, and therefore that he was not employed in interstate *commerce* within the meaning of the Employers' Liability Act."

From the foregoing it appears that during the time between the decision in *Second Employers' Liability Cases*, *supra*, and the decision in the *Shanks case* this court passed upon the question of whether the facts brought the employe within the Act in twelve cases. In seven of them the employes were engaged when hurt in transportation, and the question was limited to determining whether the transportation was or was not interstate. In five of them the employes were not engaged in transportation and the question was whether their work was so closely related to (without, in this connection using the wording of the *Shanks* case test) interstate commerce as to be, in the legal sense, a part of it.

Of those five, two of them, *Zachary* and *Lloyd*, involved enginemen who were hurt while preparing their engines for interstate trips, and they were held within the Act.

Another, *Seale*, involved an employe inspecting, marking, checking and recording the cars of an incoming interstate train, and he was held within the Act.

Another, *Pedersen*, involved an employe repairing while it was in use an interstate main-line bridge, and he was held within the Act.

The other, *Yurkonis*, involved an employe mining coal for use in interstate locomotives. He was held without the Act.

If the *Shanks* case test be applied to the facts in the first named four of those five cases, it is found that in each one of them the test is satisfied and the decision stands as rendered. In other words, those four decisions held within the Act employes who, at the time of their injuries, though not engaged in interstate transportation, were engaged "in work so closely related to it [interstate transportation] as to be practically a part of it [interstate transportation.]"

On the other hand, it is plain that in the fifth case (*Torkowis*) the facts do not satisfy the test, the work being too remote from the transportation.

Since the *Shanks* case was decided this Court has in quite a number of cases cited its decision in the *Pedersen* case, the last time being, we think, in *Industrial Comm. v. Davis*, 259 U. S. 182, 185, decided May 29, 1922.

In *New York Central v. White*, 243 U. S. 188, 192, the *Pedersen case* is cited, but in connection with the *Shanks* case test, as pointing out and supporting the proposition that work in *new construction* is clearly outside the act because having "no direct relation to interstate *transportation*" (pp. 191-2).

In *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 573, the work of the employe being in *clearing an interstate track of a wreck* so that an interstate train might proceed on the track, the *Pedersen* case was cited to and as supporting the proposition that repair of interstate tracks while they are in use is employment in interstate commerce. At p. 573 the court quoted and expressly concurred in the view of the court below, that plaintiff's "work facilitated interstate *transportation* on the railroad, and that consequently he was engaged in interstate commerce when injured." And speaking of the other cases cited in the same connection the opinion says:

> "the other cases are to the effect that preparatory movements in aid of interstate *transportation* are a part of such commerce within the meaning of the act."

In *New York Central v. Porter*, 249 U. S. 168, 169, an employe was hurt while shoveling snow off an interstate track. In the short opinion it is said that upon the authority of the *Pedersen* and *Puckett* cases he was within the Act.

In *Philadelphia, etc. v. Smith*, 250 U. S. 101, 103, the *Pedersen* case is cited as settling the question "that the repair of bridges in use as *instrumentalities of interstate* commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

In *Kinzell v. C. M. & St. P. Ry. Co.*, 250 U. S. 130, 132, the employe was engaged in removing earth and stones from between the rails of an interstate track to keep it clear for the passage of interstate trains. In the opinion, pp. 133, 134, the decision is grounded upon the *Pedersen* case, calls attention to the questions in that opinion said to be "naturally arising" and says that they are to be used as "a guide to a decision of *such* a case."

In *Southern Pacific Co. v. Ind. Acc. Comm. of Cal.*, 251 U. S. 259, 263, a lineman of an electric railroad was held to be within the Act while wiping the insulators of the main power line which furnished the power to operate the defendant's interstate trains. The *Pedersen* case is cited, but the decision is upon the authority of the transportation test of the *Shanks* case.

In *Erie R. R. Co. v. Collins*, 253 U. S. 77, 83, 85, decided May 17, 1920, the operator of a signal tower and switches, as well as of a gasoline engine that pumped water into a tank from which interstate engines were supplied, was held within the Act. He was injured while operating the pump, which work was held to be in interstate commerce. The *Pedersen* case is in the opinion first cited among a number of other decisions briefly reviewed. This Court's decisions so cited are the *Pedersen*, 229 U. S. 146; *Yurkonis*, 238 U. S. 439; *Harrington*, 241 U. S. 177; *Shanks*, 239 U. S. 556; *Winters*, 242 U. S. 353 and *Puckett*, 244 U. S. 571. Of the [illegible] cases named the opinion specifically puts the *Harrington* and *Shanks* cases in a class with the *Pe-*

[illegible] case]; as to the *Harrington* case it says that the court considered the work as having no "close or direct relation to interstate transportation;" as to the *Pedersen* case it says that the work was considered to be in interstate commerce because its purpose was "to open the way for interstate *transportation*."

In *Philadelphia & R. Ry. Co.* v. *Di Donato*, 256 U. S. 327, 329, decided May 16, 1921, a flagman at a grade crossing of an interstate line was held within the *Act* upon the authority of the *Pedersen* case because his duties included keeping the interstate tracks clear of disorder and obstructions.

In *Industrial Commission* v. *Davis*, 259 U. S. 182, decided May 29, 1922, a machinist repairing an engine that had been withdrawn from transportation for general overhauling and repair was held not within the *Act*. The *Pedersen* case is cited in a footnote, p. 182, as being *one of the* cases which influenced the California court to its incorrect conclusion that the work of the employe was "so intimately connected with interstate commerce as practically to be a part of it."

The reversal here is grounded upon (p. 185) the "*transportation test*," quoting it and citing the *Shanks* case, and saying that it was used *as the test* in deciding the *Harrington* and *Southern Pacific* v. *Industrial Accident Commission* cases; that the *Shanks* case "is particularly applicable to the present case;" that it "furnishes the test * * * and by it, and the cases that have followed it, * * * the *ruling* [of the court below] must be *judged*."

The *Pedersen* case served its purpose as a pioneer in the field, and considered the test with reference to work in repairing interstate bridges and roadbeds while in the as such. It has not been found necessary for this Court to cite it as supporting any decision on like facts since May 16, 1921, in the *Di Donato* case, *supra*.

Cases decided by use of the Test.

As has been shown, the language of the "*transportation test*" had its origin in *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, decided January 10, 1916. Since that date it has been cited by, followed and applied by this Court in the following cases:

Chicago, B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177, 180, decided May 1, 1916, involved the work of a switchman moving cars of coal from a storage yard, where, after an interstate journey, they had been for a week or more, to coal-chutes into which the coal was to be unloaded by other employes and thereafter supplied to interstate locomotives. It was held that he was not within the Act. In the opinion, p. 180, it is said:

> "As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and 'the true *test* of employment *in such* commerce in the sense intended is, was the employe at the time of the injury engaged in interstate *transportation* or in work so closely related to *it* as to be practically a part of *it*.' *Shanks* v. *Del., Lack. & West., R. R.*, 239 U. S. 556, 558, and cases there cited. Manifestly, there was no such close or direct relation to interstate *transportation* in the taking of the coal to the coal chutes."

Illinois Central R. R. Co. v. *Cousins*, 241 U. S. 641, decided February 21, 1916, involved a laborer hurt while wheeling a barrow of coal to and for use in stoves which warmed a shop in which other employes repaired interstate cars. This Court held (*per curiam*, no opinion) that he was *not* within the Act, "upon the authority of *Delaware, Lackawanna & Western Railroad v. Yurkonis*, 238 U. S. 439; *Shanks v. Delaware, Lackawanna & Western Railroad*, 239 U. S. 556."

In the court below (126 Minn. 172, 148 N. W. 58) it was held that Cousins *was* within the Act, upon the authority of *Pedersen v. Delaware, Lackawanna & Western*, 229 U. S. 146. The case is so like the case at bar and so well illustrates the dangerous applications being made by the lower courts of some of the language used in the *Pedersen* opinion that we quote rather extensively from the opinion of the Supreme Court of Minnesota:

> "The men in the shop were engaged in repairing cars that had been and were to be used in interstate commerce. Plaintiff, when he was injured, was wheeling coal to be used in heating the shop so that these men could do their work. The question is to be determined from the language of the federal act and the federal decisions construing it. * * *
>
> "That the men engaged in repairing the cars were employed in interstate commerce is well settled. That an employe carrying materials to the shop to be used in repairing the cars would be employed in interstate commerce the Pedersen case decides. It seems no extension of the construction thus given to the statute to hold that an employe carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop was heated. It is not material what our own views are on the proper construction of the federal statute. We are bound by the decisions of the Supreme Court of the United States. We think the *Pedersen* case controls the case at bar. * * *
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> "Counsel for defendant correctly say that the decision in the *Pedersen* case has apparently warranted the conclusion that the federal Supreme Court would ultimately construe the act of Congress as applicable to practically all employes of interstate railroads, ex-

cept possibly those engaged in the work of new construction of instrumentalities as distinguished from repairs upon old instrumentalities."

It is to be noted that this Court decided the *Shanks* case January 10, 1916, and the *Cousins* case February 21, 1916, the two cases being before it at the same time. It seems to us probable that the above language of the Minnesota court in the *Cousins* case also had effect in necessitating and bringing about the adoption by this Court of the "*transportation test*" laid down in the *Shanks* case.

In *Erie R. R. Co. v. Welsh*, 242 U. S. 303, 306, decided December 18, 1916, the trial court had held that a switchman was not within the Act at the time of his injury. The Ohio Supreme Court affirmed. This Court affirmed, citing the *Shanks* case to the proposition that the question relates only to the work being done at the time of the injury.

In *Minneapolis & St. Louis R. R. Co. v. Nash*, 242 U. S. 619, 620, decided January 8, 1917, it was held (*per curiam*, no opinion) that the employe was not within the Act, "upon the authority of" the *Yurkonis*, *Shanks*, *Harrington* and *Cousins* cases.

Yurkonis, mining coal to be used in interstate locomotives.

Shanks, changing the location of a shaft that supplied power to a machine used in the repair of interstate locomotives.

Harrington, switching cars of coal from storage yards to chutes from which interstate locomotives were supplied.

Cousins, wheeling a barrow of coal to and for use in stoves which warmed a shop wherein interstate locomotives were repaired.

This *Nash* case came here from the Minnesota Supreme Court (*Nash v. Minneapolis & St. L. R. R. Co.*, 154 N. W. 957) and was decided by that court, as was the *Cousins* case, prior to this Court's decision in the *Shanks* case, and also prior to this court's decision in the *Cousins* case. It involved a bridge and building (B&B) carpenter hurt while transporting an outhouse (privy) which his crew had constructed at Marshalltown, Iowa, to the Station of St. Anthony, Iowa. On the way it fell off the car and was broken. The B. & B. crew loaded it onto a pushcar and while thereafter further moving it towards its destination Nash was hurt. The Minnesota court held that he was within the Act and in its opinion briefly reviewed cases in which employes were held within the Act and others to the contrary, among the former the *Pedersen* case and the *Carr* case, 228 U. S. 260, and its own decision in the *Cousins* case, not yet then reversed by this court, and among the latter the *Behrens* case, 233 U. S. 473, and the *Yurkonis* case, 238 U. S. 439. In its statement of the facts and their bearing on the question involved, that court (154 N. W. 958) said:

> "The station buildings and the outhouses connected therewith are provided for the accommodation of interstate as well as intrastate passengers, and are unquestionably used in connection with interstate commerce. * * * [The question] must be determined by the federal law and the construction given to that law by the federal courts."

Then, after lengthy quotations from the *Pedersen* opinion the court said (154 N. W. 959):

> "In the instant case, the old outhouse, for which the one in question was to be substituted, was a mere appendage to defendant's station building or depot. This depot was used in interstate commerce, and replacing the old closet by a new one was rather in the nature of repairs to the station accommodations pro-

vided for the use of the traveling public, than the installation and erection of a new and independent structure. * * * We fail to find any substantial distinction between this case and the *Pedersen* case. In that case, bolts and rivets were being carried to a bridge for use in constructing a new girder to replace an old one. In the instant case, the outhouse was being conveyed to a depot already in use, for use in connection therewith."

The decision below in the *Nash* case shows another application of the *Pedersen* opinion to a different situation and emphasizes the necessity for repetition of and adherence to the "*transportation test*," used by this Court in reversing it.

In *Baltimore & Ohio R. R. Co.* v. *Branson*, 242 U. S. 623, 624, decided January 29, 1917, it was held (*per curiam*, no opinion) that the employe was not within the Act "upon the authority of" the *Yurkonis*, *Shanks*, *Harrington* and *Winters* (242 U. S. 353) cases. The Court of Appeals of Maryland had held that Branson *was* within the Act; *B. & O. R. Co.* v. *Branson*, 98 Atl. 225, decided May 17, 1916, four months after this court's decision in the *Shanks* case, which is not mentioned in the opinion of the Maryland court. Branson was a painter and was hurt while painting cars and engines used in interstate commerce, with a paint-spraying apparatus or paint-gun, in a roundhouse. The state court said (98 Atl. 230):

> "Engines and cars are necessary instrumentalities in the business of interstate commerce, and it is the duty of the carrier to keep them in safe condition and proper repair. Without paint the engines would corrode and the woodwork of the cars decay. The work of painting the engines and cars would seem to have *a reasonable and substantial relation to interstate commerce.*"

In *New York Central R. R. Co. v. White*, 243 U. S. 188, decided March 6, 1917, it was held that guarding tools and materials intended for use in the construction of a new station and tracks, which, when finished, were to be used in interstate commerce, was not work that brought the employe within the Act. At p. 192 the opinion quotes and applies the *Shanks* case test, as "*the test*," cites that case, and says:

> "Decedent's work bore no *direct relation* to interstate *transportation*," etc.

In *Southern Pacific Company v. Industrial Accident Comm.*, 251 U. S. 259, 263, decided January 5, 1920, it was held that a lineman for an electrically operated railroad was within the Act while cleaning the insulators of the main wire which carried the electric current which moved the cars and trains. In the opinion it is said (p. 263):

> "Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, *in relation to commerce*, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate *transportation* as practically to be a part of *it*."

Then, after a brief reference to the facts:

> "Applying the suggested *test*, we think these circumstances suffice to show that his work *was* directly and immediately connected with interstate *transportation* and an essential part of it."

In *Erie v. Collins*, 253 U. S. 77, 84, decided May 17, 1920, this court held that an employe while operating a gasoline pump that elevated water into a tank from which interstate locomotives were supplied was within the Act. In the opinion are briefly reviewed the *Pedersen*, *Yurkonis*, *Harring-*

ton, *Shanks*, *Winters* and *Puckett* cases. At p. 58 the opinion says:

> "In the Pedersen Case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it'? Or as said in *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, *supra*, was the 'work so closely related to it [interstate *commerce*] as to be practically a part of it'?"

We suggest that, literally, the above language is contrary to the intention of the opinion, because the words in brackets are an obvious misquotation and not intended to change the *Shanks* case test or in any way depart from it. We believe that the *Shanks* case deliberately adopted and laid down its test because of misapplication by the lower courts of certain language found in the *Pedersen* opinion. The test and its use and purpose are clearly stated. The close relation referred to is to interstate *transportation*. That the words "*commerce*" and "*transportation*" are not used or meant interchangeably is clear and plain from every appearance of them in the opinion.

Those bracketed words in the opinion in the *Collins* case have caused trouble in the lower courts. In the case at bar plaintiff's counsel, in his "Reply to Petition for Writ of Certiorari," says that this Court did not intend that the *Shanks* case test "should be given the limited or narrow construction contended for by defendant," and that "the distinction between 'commerce' and 'transportation' which counsel are attempting to make in this case, has not been recognized by this Court as evidenced by its decisions subsequent to the *Shanks* case in which *the terms are often used interchangeably*." And again, in the same document, at p. [illegible], he makes the same statement and cites and quotes from the *Collins* case to support it, italicizing, for emphasis, the part containing the bracketed words, but using parentheses instead of brackets. And, on p. 24, he says that this Court could not have meant the test as it appears in the *Shanks* decision, "otherwise this Court would not have expressed the views or reached the conclusions that it did in the" *Collins*, *Szary* (253 U. S. 86) and *Smith* (250 U. S. 101) cases, "*or in the great majority of cases where the employment was held to have been in interstate commerce.*"

However, those statements find no support in the decisions of this Court, other than in the probably inadvertent or clerical error in the misquotation in the *Collins* opinion's brackets.

In *Industrial Com. v. Davis*, 259 U. S. 182, decided May 29, 1922, two years after the *Collins* decision, it was held, reversing 50 Cal. App. 161, that an employe repairing an interstate engine was not within the Act. Commencing just below the middle of p. 185 the opinion indicates as plainly as words can the then complete adherence of this court to the "*transportation test*" of the *Shanks*, *Harrington* and other cases:

> "The *test* of the employment and the application of the Federal Employers' Liability Act is, 'was the employe at the time of the injury engaged in interstate *transportation* or in work so closely related to *it* as to be practically a part of *it*?' *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556. * * *
>
> "*Shanks v. Delaware, Lackawanna & Western R. R. Co.* is particularly applicable to the present case. It illustrates the test by a contrast of examples and by it, and the cases that have followed it, the ruling of the District Court of Appeal must be judged."

Commencing at the top of p. 187 the opinion proceeds:

> "We refrain from a review of our cases. They pronounce a *test* and illustrate it. The federal act gives redress only for injuries received in interstate *commerce*. But how determine the *commerce*? Commerce

> in movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it; but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively, against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employe at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act."

In *Baltimore & Ohio S. W. R. R. Co.* v. *Burtch*, 263 U. S. 540, decided January 7, 1924, four years after the *Collins* decision, this Court (p. 543) said:

> "This constitutes the entire evidence upon the point [as to the interstate character of the shipment being unloaded at the time plaintiff was hurt] and plainly establishes the interstate character of the shipment. But this is not enough. It is necessary to show further that 'the employee at the time of the injury (was) engaged in interstate transportation or in work so closely related to *it* as to be practically a part of *it*.' *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558."

And at p. 544:

> "It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it, and it follows that the facts fully satisfy the *test* laid down in the *Shanks* case, supra."

Pedersen Language Not a "Test".

The use, as a "test," of certain of the language of the opinion in the *Pedersen* case has resulted in considerable confusion. Particularly is this so as to "the questions that naturally arise" therein specified. We believe that those questions were not intended to be used as "tests."

When "commerce" and "interstate commerce" are considered in their technical legal sense they neither commence nor end with transportation, but embrace the prior purchase and later sale, and comprehend intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. *Brown* v. *Maryland*, 12 Wheat. 419; *Welton* v. *Missouri*, 91 U. S. 275; *American S. & W. Co.* v. *Speed*, 192 U. S. 500; *American Express Co.* v. *Iowa*, 196 U. S. 133. In fact, in all of the cases, "transportation" is said to be but a part of "commerce." These cases involved the commerce clause of the Constitution. Generally speaking, and except as they may themselves engage in commerce in that large, or legal or Constitutional sense, the railways engage in only that part of commerce that is transportation. And in the *Shanks* case, and the decisions following it, this Court properly limited the application of the Liability Act to the railways' part in such commerce. In doing so the court said (*Shanks* v. *D. L. & W.*, 239 U. S. 556, 558):

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, and that the true test of employment in such commerce in the sense intended is, was the employee

at the time of the injury engaged in interstate *transportation* or in work so closely related to *it* as to be practically a part of it."

To substitute the word "commerce" for the word "transportation" in the test would make the test meaningless in connection with what precedes and follows it in the *Shanks* case opinion, and would enlarge, instead of limiting to a practical sense, the Act itself. That this is so seems obvious, for the Act is for the benefit only of employes while engaged *in* interstate commerce—not for those whose work is so closely related to interstate commerce as to be practically a part of it.

2.

When the facts as to and the purpose of what the employe was doing at the time of his injury are not in dispute the question whether such facts bring the parties within the Liability Act is a question of law.

Illinois Central v. Behrens, 233 U. S. 473.
P. & R. Ry. Co. v. Hancock, 253 U. S. 284.
Erie v. Van Buskirk, 228 Fed. 489-90, 493.
C. N. O. & T. P. v. Hall, 243 Fed. 76, 80.
Clemmons v. H. & M. R. Co., 11 Fed. (2d) 913.
Youngstown v. Halverstadt, 12 Fed. (2d) 995, 997.
Wallace v. N. Y. etc., 121 Atl. (Conn.) 878.
Johnston v. C. & N. W. Ry. Co., 225 N. W. (Ia.) [illegible].
[illegible] v. Indus. Comm., 227 N. W. (Wis.) 249.

In *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 475, the Circuit Court of Appeals certified to this Court a short statement of the facts and asked this Court whether, on such facts, the employe was engaged in interstate commerce within the meaning of the Employers' Liability Act. The question was one of law and was so treated and answered by this Court under section 239 of the Judicial Code. By that section none but questions of law may be asked of or answered by this Court. It cannot and will not pass upon "questions of fact or mixed questions of law and fact, but only upon a 'clean-cut question of law.'" *United States* v. *Mayer*, 235 U. S. 55; *Stratton's Independence* v. *Howbert*, 231 U. S. 399; *Graver* v. *Faurot*, 162 U. S. 435; Note 2, Fed. Stats. Ann. 2d Ed., vol. 5, pp. 840, 841, citing nine decisions of this court citing and following *Graver* v. *Faurot*, *supra*.

In *P. and R. Ry. Co.* v. *Hancock*, 253 U. S. 284, 286, a case involving the question whether an employe came within the Liability Act, this court said:

> "The essential facts are not in controversy; the nature of the employment, therefore, is a question of law."

In the decisions by lower federal and the state courts cited under the heading of this point, it was *held error to submit the question to a jury* when the facts of the work and its purpose were not disputed; that it must be decided as a question of law.

The law in Illinois on the subject of what constitutes a question of fact for the jury in cases under the Liability Act, as stated in this case by the Supreme Court of Illinois is said to be (324 Ill. 470, 482) as follows:

> "Whether or not at the time of the accident plaintiff was employed by defendant in interstate commerce was a controverted question of fact upon which plaintiff had a constitutional right to a trial by jury. This question of fact was the main issue in the case. Whenever an issue is made in a case and evidence

> must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony."

The Appellate Court, 253 Ill. App., at page 558, quoted, adopted and applied the above quoted rule, commencing with the words "Whenever an issue is made," and added to it the following:

> "* * * or the evidence may be agreed upon or embodied in a stipulation of fact."

This must be corrected if there ever hereafter is to be any but a jury decision in Illinois on this question. It seems to us that this alone should require the reversal of this judgment. Every interstate railroad subject to suit in the courts of Illinois is affected, and it will be of immense benefit to the bench and bar if this court again will state the true rule, namely, that in cases seeking recovery of damages under the Liability Act the question whether the Act applies is, if the facts as to and the purpose of what the employee was doing at the time of his injury are undisputed, a question of law, and that in them it is the duty of the trial court to either instruct the jury (if other questions on the facts are for the jury) that the employe is within the Act or to direct a verdict for the employer on the ground that the employe has no cause of action under the Act. We believe that such a statement by this Court is needed and that if made herein it will result in a substantial reduction of this kind of litigation.

6.

Employer Not Negligent.

Because plaintiff failed to sustain the burden of proving that negligence of the defendant was the proximate cause of his injury it was error for the trial court to deny defendant's motion for a directed verdict.

Negligence is the basis of all liability under the Liability Act, and there can be no recovery where it is absent.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472.

The reasonable man will order his precaution by the measure of what appears likely in the known course of things.

Atchison, etc. v. Calhoun, 213 U. S. 1, 9.

There is no liability unless the injury in the way it occurred might reasonably have been anticipated. *Applied here this means that there was no actionable negligence.*

Gulf, etc. v. Wells, 275 U. S. 455, 459.
[illegible] & N. Ry. Co. v. Allen, 9 Fed. (2d) 954, 955.

Even if the engine bell was not rung, such failure was not a violation of any duty owed to plaintiff. *Any such signal, as a warning that the engines were to be moved, was for the switch crew, who might be on the tracks or in other positions of danger.*

C. & O. v. Mihas, 280 U. S. 102, 105.

Plaintiff testified he knew nothing of the rules (one rule admitted in evidence over our objection, R. 67) and never had a book of rules (R. 34), so it is plain that, at the time, he did not rely upon them.

In its attempt to find justification for holding that a jury question was made by plaintiff's evidence as to negligence of the defendant being the proximate cause of the injury the opinion of the court below (pp. 555, 556) is necessarily somewhat hazy. It finds its justification mostly in a want of care on the part of McManaman, plaintiff's witness, who was the foreman in charge of the movement of the engines to and from the coal-chutes, saying that he had "discovered that there was a man up on top of the third engine from the south" etc., and that prior to that he had seen plaintiff on top of the heater-engine during the taking of water, etc. This is followed in the opinion by the supposedly very damaging testimony of McManaman that *after discovering* "the man" he had time to do something but did nothing. Examination of his testimony, however, reveals that it is not damaging at all, but, on the contrary, absolves him of any want of care. Among other things he said:

> "My men were not in the habit of taking coal on our engines, any of the switching crew, they did not have to put the coal in; there was a coal-chute man there who directed that work. I never saw Bolle until after the accident to know him (R. 41). * * * I did not know who that man was up on the second engine from the north (R. 41). There were no headlights lighted between the engines (R. 42). This coal-chute man was the man who instructed us where to get the coal, but he would take the coal himself. * * * Neither I nor any member of my crew, or any man with me that night, had any duty in connection with that (R. 44). * * * With reference to all of the movements after our engines got through the crossover and down to the coal-chute, the coal chute man directs those movements. He gives his directions to the engineer (R. 45). * * * He gives his directions verbally. I know he was giving them that night because I heard them [although] I was on the northbound main track, 16 or 18 feet away from the engine, on the side away from the coal

> chutes, the engines being between me and the coal-chute man. I could hear him giving directions to operating the engines, as to which slide to use, and whether to back up or move forward, and so on. Just before this accident happened the coal-chute man left (let) some coal down into the second engine from the south; then he released the slide and it went up; then I discovered that there was a man on the top of the third engine from the south" (R. 45).

Now, *that* was the "discovery" of the man on top of the heater-engine, which was thought below to be the first step in the proof that McManaman, plaintiff's witness, ex-employe of defendant, was guilty of negligence which was the proximate cause of plaintiff's injury. It was his inaction after that "discovery" which was thought to be the second step in the proof, for he testified that thereafter he had time to do something, but did nothing, because he "didn't think *they* would do anything while that man was there" (R. 45). But that inaction was reasonable, and shows no want of care whatever on McManaman's part, for he was reasonably and naturally justified in thinking that the engines would not be moved "while that man was there." He further testified:

> "After the coal-chute man [on the second engine from the south] put up his slide I heard him tell the operator of the engine to back up. * * * *At once after the order was given* Kucera [such operator] backed the engines north; that is what the order meant. *He followed that order as soon as it was given*" (R. 45).

From which it is seen that the interval of McManaman's supposedly negligent inaction was between the time of his "discovery" and the giving of the order to move by the coal-chute man, which order was *immediately* followed by the movement which injured plaintiff. So that even if the record ended there it is plain that McManaman was guilty of no want of due care in failing, after his "discovery" and before the order to move was given, to "do something," for there was nothing in the situation during that interval that would suggest that anything should be done. It was after the unexpected order to move was given that danger first showed its head. This is clearly shown by his further testimony:

> "In this brief (R. 46) instant of time that I saw this man I didn't know who it was. I thought it was the coal-chute man. * * * The impression that I was under was that there were two coal-chute men there. There was no reason that I knew of why any other person except a coal-chute man should be there." (R. 51).

And, of course, if it were a coal-chute man, he would be in no danger because the coal-chute men themselves alone direct the movements. None occurs except upon their orders and none could occur and they would order none while they themselves would be endangered thereby. And there was nobody there, except them, who could, if in his proper and expected place, be endangered by a movement of the engines ordered by the coal-chute men. McManaman further testified:

> "Customarily, and at the time of the accident, those engine riders [such as plaintiff] would be in the cabs of the engines (R. 47). * * * My duties in connection with the taking of this coal only commenced after the coal was taken on all the engines. I didn't have anything to do with taking of coal. I and my helper were just standing until the operators of the engines and the coal-chute man were finished with taking the coal. We were standing some distance away from the engines" (R. 47).

The court below seems to have considered that McManaman's testimony made this a "discovered peril" case, but we believe that the excerpts hereinabove quoted show conclusively that as a matter of law McManaman's conduct was not negligence under the applicable rules and decisions.

And it must not be forgotten that it is uncontradicted and proved that neither the coal-chute man who gave the order to move nor the engineman who obeyed it and moved the engines saw or could have seen the plaintiff where he was from where they were (R. 47-8, 68, 70, 71, 80).

Although the only negligence found by the court below to present jury questions was (1) the "discovered peril," above discussed, and (2) the failure to ring the bell, yet counsel for plaintiff contends that there was other negligence for the jury. See V, p. 24, his Brief against issuance of the writ. He contends that it was negligent to direct this inexperienced man to get on his engine and accompany it to the coal-chutes without giving him specific information as to the method used in coaling engines. But, on the record, these contentions do not stand up.

It is true plaintiff was inexperienced, but the work he was required to do was simple. He was instructed as to each thing he was required or expected to do, by Tony, the engine-watcher and by his own brother (R. 51). Plaintiff testified:

> R. 18: During my first few weeks of service there I learned how to do my work there by seeing Tony do it; he taught me how by telling me and I observed it also.
>
> R. 19: [The night of the accident] Tony said "Gene, get up on your engine. We have to go to Beach to get coal and water," and I got up on the engine.

That was the "instruction," and there isn't a word in it to reasonably indicate to Bolle that he was himself to take either the water or the coal. That he did not so interpret it at the time is demonstrated by his further testimony:

> R. 19: When the engines arrived at Beach they stopped on the main line and took water. I was then in the cab of the engine. After my engine had been brought to a stop at this waterspout Tony (got out on the ground and) hollered at me and told me to get up and take water. In response to that direction I got up and took water.

From which it is clear that in taking the water he didn't act on the original "instruction."

Furthermore, then and there he learned that Tony had no right to give him instructions or require him to take any part in the work on that trip, but to stay where he belonged and attend to his own business. He testified:

> R. 19-20: McManaman told me to throw the water-spout aside. I told him we did not have enough water, and he said "damn it, throw it aside."

Notwithstanding which, without any order or suggestion from anybody, he tried to take coal at the chutes. To justify this he reverts to his oft-repeated testimony that when he first went to work in the roundhouse he was told to do whatever he saw Tony do. His brother did not corroborate this, but said that he told him (R. 51) to go to Tony and take orders from him and do (at the roundhouse) as Tony told him to do and follow his instructions in case I (the brother) went away. But plaintiff testified:

> R. 18: My brother told me to see Tony Terasky and take orders from him and do as he does.

> R. 20: These engines stopped in front of the coal-chute. A man got up on the most southerly engine and reached up and pulled down the coal-chute. I did not do anything at that time.

> R. 20: They started again. I seen a man get up on the second engine from the south, reach up and pu

down the chute. I did not look to see that engine. I thought it was Tony [illegible]. [illegible] reached up and pulled down the chute and the coal came down, and I reached up and pulled mine down. While standing up on the tender of my engine [illegible] I started to put coal into it, I saw Mr. [illegible] and his helper standing on the west track about at the head of my engine.

On cross-examination he testified:

R. 23-4: My brother told me to take orders from Tony and *do as he done*, the next time there was anything *like that to do, do as he done*; [illegible] to do *whatever I saw Tony do*. He (Tony) would call for me to go and turn the turntable. What I mean by "do as he done," if work was required (R. 24) to be done and Tony was busy why I would do it. It was when he was away at Beach that I done the things I saw Tony do. *(I meant by my language—that my brother told me to take orders from Tony and do as he done—that when Tony went to Beach for coal and water I was to do, in his absence, what I had seen him do while he was there.)*

From which it is clear that his justification for trying to take coal, which was that he *thought he saw Tony doing it on another engine*, and because he had been told by his brother when he first went to work in the roundhouse to do as Tony done, has no weight whatever.

And further, on cross-examination, he testified:

R. 25: He (Tony) didn't ask me to do anything I wouldn't know anything about. I learned to do these various things by his telling me in the first place to come and watch him do it and see how it (R. 26) was done. *With respect to everything I learned to do down there I was first instructed to do it and shown how to do it. I never did anything that I didn't know how to do, without learning first how to do it; somebody else told me to do it and then showed me how the first time.*

R. [illegible]: That part of a coal-chute (from which the coal is taken) I had never seen before the night of the accident and had no knowledge of how these things worked.

R. [illegible]: I had seen water taken, over in the yards at [illegible], time after time.

R. [illegible]: When my brother showed me how to fire the stationary boiler he showed me how. When Tony [illegible] showed me how to fire the locomotive he showed me in detail how to do that.

R. [illegible]: At no time after I took the water did I have any conversation with any other persons around me. I didn't speak to anybody and nobody spoke to me. When the engine first stopped at the coal-shed the [illegible] of my engine was opposite one of the slides on the coal-shed I think. I made no attempt at that time to take coal on my engine (R. 51).

R. [illegible]: That chain that I took hold of and pulled down looked like a dog-chain. I never saw one of those chains before.

R. [illegible]: I figured out because there was a chain on the chute next to me that that must be what the man on the engine next south of me was reaching for; that that was the only way the chute would come down. I didn't know it. That is what I thought. I figured out he must have pulled a similar chain on the coal-chute beside his engine.

R. [illegible]: I had seen coal-chutes before, but never seen them take coal. At that time I didn't know anything about it. I didn't attempt to get up and take water before Tony came to me there and told me to do that.

We [illegible] that there was no question for the jury as to negligence on the part of the defendant in (1) requiring [illegible] to accompany the hostler-engine to the chutes, or [illegible] him not to do what he was attempting to do at the time of the injury.

As to the charge of negligence for failure to ring a bell before starting the movements of the engines that injured plaintiff, the record discloses no question for the jury.

The man operating the engines at that time testified that the bell was rung (R. 78). No witness testified to the contrary. Plaintiff's testimony on the subject was without legal weight, for he said he neither heard nor saw any signals of any kind at any time. When asked about it he said: *"I wasn't paying any attention"* (R. 30); *"I did not, at any time while I was up there, or while the movements were going on, pay any attention to any matter of signals of any kind;"* (and further to the same effect, R. 29-30).

D.

Plaintiff a Volunteer, Injured by His Own Act.

Plaintiff had no duty to perform in connection with the coaling operation. When he reached up and pulled the chain and let down the coal-slide so that he was between it and the engine cab (R. 48), he was a mere volunteer, no matter what he says about thinking it was his duty; and it was his own conduct that was the sole cause of his injury.

2 Roberts Fed. Liab. Carriers, 2nd Ed. sec. 874.
Great Northern v. Wiles, 240 U. S. 444.

E.

Contributory Negligence.

In no aspect of the case can the conclusion that plaintiff was guilty of contributory negligence be escaped. His own story [illegible] him of it. Yet the jury answered [illegible] full damages for his injury. Defendant's requests (R. [illegible]) that the trial court instruct the jury that plaintiff was guilty of contributory negligence as a matter of law and that they should reduce the damages accordingly should have been granted. To refuse them was error.

2.

Assumption of Risk.

On plaintiff's own story he assumed the risk of a movement of the engines, even without prior signal by bell.

After pulling down the coal-slide he was in a little foot-square space, between the coal-slide and the cab of the heater-engine, where, it was wholly obvious to anyone, if the engines moved in either direction he was bound to be hurt. And he did this although, as he testified, he had already observed that the engines were being moved back and forth without signals of any kind.

The case cited, quoted from and relied upon by the Appellate Court in denying *defendant's* contention as to assumption of risk (*[illegible] v. Ill. Cent. R. Co.*, 220 Ill. App. [illegible]) is in truth an authority for, and not against, such contention. In it, at least in one place, the Federal rule is correctly stated to be that the employé does "not assume the risk of an unexpected *negligent departure from* the customary method of doing * * * dangerous work." But the situation here was not such. Plaintiff testified, on his direct examination:

> "After the through train went through * * * I got back upon the heater; * * (The engines) went to the [illegible] south; they took the [illegible] on the next track; then they [illegible] towards the [illegible]. * * * After the [illegible] they moved south several

(R. 20). * * * I did not receive any notice or anything that the movement (the movement that caught him) was to be made (R. 20-1)."

On his cross-examination he testified (R. [illegible]):

"I again got upon the top of the tender * * * hanging onto the roof of the cab. That was not where you take water, but I *said* that my reason for getting up on the tender again was to take water. I stood there on that shelf while the engines came out from the side-track, and until they got on the main track, and * * * north so up beyond the coal chutes. * * * We had to go through a switch to go out of the side-track, and through a switch to get north of the crossover, and back through the same switch south. Going through all that number of switches I was standing up there on this little shelf. We went by the water pipe where I had taken water, without slowing down or stopping, and I stayed up there * * * not where they take water, for the purpose of taking water. * * * During that trip, from the time I took water, onto the side-track and off the side-track, and north on the crossover past the coal chutes and back over the crossover, I saw no *signals* given by any member of the crew or by anybody else. No signals were given by any member of the crew or anybody else. * * * I did not hear anybody give any instructions as to directing the engines to move or where they should move to. * * * I did not at any time while I was up there * * * pay any attention to any matter of signals of any kind (R. 30) * * * At no time during the trip I took there, after I took the water, did I have any conversation with any other persons around me. I didn't speak to anybody and nobody spoke to me (R. 30) * * * When the engines moved south from the crossover onto the coal shed track, they first stopped at the coal shed and the pilot of my engine was opposite one of the slides on the coal shed I think. I was standing on this little shelf * * * all during the time that coal was being taken on the most southerly engine. I made no attempt at that time to take coal on my engine (R. 31). * * * They had moved [illegible] signals? A. I didn't hear any. * * * At the time when they spotted for the southerly engine there was no signal that I know of (R. 32). * * * The first coaling was on the most southerly engine. I saw a man up there and saw the chute come down, and then they moved without giving any signal that I know of; they moved south that time" (R. 32).

G.

Improper Evidence Admitted.

The trial court erred in admitting evidence, over defendant's objections, that the active or operating engines which hauled the heater-engine to the coal-chutes were being coaled to thereafter engage in interstate transportation (R. 15). The facts as to this were embodied in a stipulation which was offered in evidence by plaintiff (R. 15-17) *was admitted over defendant's objections to which it was made subject* (R. 15) and read to the jury and into the record (R. 15).

Later, at the proper time, defendant requested the court to exclude such evidence, by instruction, from the jury, which was refused (Nos. 25, 26, R. 116-117). See H of this brief, *infra*.

H.

Refusals to Instruct, and Instructions Given.

If, under the Liability Act, this case was properly for the jury, yet it should have been submitted to the jury with proper instructions as to the law.

It may not always be error to instruct generally if no specific requests are made, but if they are made they must

R

be given if they are in accord with the *Act* and the interpretations of this Court.

Seaboard, etc. v. Horton, 233 U. S. 492, 502, 503-4.
Gulf, etc. v. Moser, 275 U. S. 133, 135-6.

1. *Refusals of Defendant's Requests.*

We respectfully urge that the trial court should not have refused to give to the jury *defendant's* requested instructions numbered 6 (R. 112) and 21 (R. 116). At least one of them should have been given as a matter of fairness to the jury as well as to the defendant. Illinois has a Workmen's Compensation Act, which is applicable to the parties hereto if the Liability Act is not, and the jury was entitled to know that a finding that plaintiff was not within the latter would not affect any rights he had under the former. No. 21 (R. 116) was surely a fair request.

No. 11 (R. 114) was to tell the jury that even if they found that the bell was not rung, yet if they also found that ringing it would not have prevented plaintiff's injury their verdict should be for the defendant. The requested instruction applied the correct rule of proximate cause to the facts and should have been given.

No. 20 (R. 116). To refuse to give this instruction was plain and prejudicial error. The movement of the four engines coupled together from the roundhouse to the coal chutes was not a movement in interstate transportation. This is obvious. Three of the engines were yard or switch engines, sometimes in their regular work moving cars containing interstate shipments, while the fourth was the heating plant on wheels. The movement was wholly within the State of Illinois, and was in fact but a yard movement (both the roundhouse and the coal chutes being in the Waukegan yards), conducted and participated in by the yard [illegible] crew only (R. 45-8). Nothing was bein transported by any of them. They were being coaled fo their regular work. If any of the employes on any o those other engines was at the time engaged in interstate commerce it was not because his work was in interstate transportation, but because it was so closely related to it as to be practically a part of it. *Shanks* v. *D. L. & W.*, 239 U. S. 556. Relying on the refusal to give this instruction plaintiff's counsel aggravated the error of the court by arguing to the jury that this movement was a movement in interstate commerce (R. 101), saying that the active or operating engines, that hauled the heater-engine to the shops "had interstate commerce work mapped out for them; * * * supplying these engines with coal and water for use in interstate commerce of course is employment in interstate commerce; * * * [illegible] was placed in this string of engines, and while he had nothing to do with the movement of it, he was none the less engaged in *a movement of interstate commerce*, which was a part of that movement."

Nos. [illegible] (R. 116), [illegible] (R. 116-17) and [illegible] (R. 117) were requests to instruct the jury that (a) the physical coupling of the heater-engine to the yard engines did not change the character of plaintiff's work and bring what would otherwise have been work outside of interstate commerce within the Act; (b) that it was only the work that plaintiff himself was doing that was material to the question of whether the Act applied to him; (c) that the coaling of those other engines for later interstate transportation had no bearing on the character of plaintiff's work. To refuse to give [illegible] that were so plain as not to admit of [illegible]. Plaintiff had nothing to do with operating or coaling the other engines and nothing to do with any transportation they might later be engaged in.

Plaintiff was not a member of the crew of a train carrying interstate goods or going from one state to another; he was not a member of any crew. If the character of the work of these other employes has a bearing on or determines the character of plaintiff's work it would seem that if the engine being repaired in either the *Winters case*, 242 U. S. 353, 356, or the *Davis case*, [illegible] U. S. [illegible], had happened to be *physically attached to an engine undergoing "light repairs" by other employes, and which had been interrupted in an interstate trip thereby, the injured employee, by virtue of that physical attachment, would have been within the Act; which seems preposterous indeed.*

No. 23 (R. 116) requested the court to instruct the jury that plaintiff was not at the time of his injury engaged in interstate *transportation*, and it was plain error to refuse it. To come within the Act the employe must be either (*a*) engaged in interstate transportation, or (*b*) in work so *closely* related to interstate transportation as to be practically a part of it. As there was no interstate transportation involved in any work plaintiff was doing or ever did do, and the only possible way he could come under the act would be because some part of his work was so closely related to interstate transportation as to be practically a part of it, it was prejudicial error to refuse to instruct the jury accordingly. *Shanks v. D. L. & W.*, 239 U. S. 556, 558; *C. B. & Q. v. Harrington*, 241 U. S. 177, 180.

Plaintiff's counsel emphasized this error and made certain its effect upon the jury by arguing (R. [illegible]) that defendant's counsel "rang throughout his argument the word 'transportation,' as if the word 'transportation' added some charm to the definition. Interstate commerce is a good deal more than transportation. The Federal statute uses the word 'interstate commerce.'" [illegible] *charge on that subject.* When the court, in his instru *tions, tells you what the law is, he will give you the* l *guage of the Federal statute, and the word 'transporta tion' is not in it.*"

No. 28 (R. 117) requested an instruction that the fa that the heating-plant heated buildings or stationary de mounted boxcars did not bring plaintiff within the Ac This instruction should have been given upon the authority of the *Cousins*, *Nash* and other cases, *supra*.

No. 29 (R. 117-18) was an elaboration of No. 28 and wa a direct application of the *Cousins case, supra*, to the fact in the case at bar. Refusal to give it was a repudiation and overruling of that decision. It was carefully draw to properly state to the jury the law as laid down by thi Court in the *Cousins* case applied to the facts in the cas at bar.

B. Erroneous instructions given.

No. 14 (R. 104-5) instructed the jury that the *test* o whether plaintiff was engaged in interstate *commerce* wa whether he was (*a*) employed by and was at work for th defendant in interstate commerce, or (*b*) in work so closely related to such commerce as to be practically a part of it.

This Court has very patiently and persistently poin out, in the *Shanks* case and the many cases following it, that that is not the true test. *Shanks* v. *D. L. & W.*, 23 U. S. 556, 558. In them it is always said that the *true* te of employment in such commerce in the sense intended b "was the employe * * * engaged in interstate *transporta tion* or in work so closely related to *it* as to be practical a part of it."

The instruction told the jury that the test of whether plaintiff's work was in interstate commerce is whether h was in interstate commerce, which is, of course, wh meaningless, or "in work so closely related to such commerce," etc., which is not the true test. If it were, the test would enlarge the scope of the Act, which provides that the work must be in interstate commerce—not practically a part of it, but in it.

No. 15 (R. 100) was a similar paraphrase of the test, but using the word "substantially" instead of "practically" in the second part of it, and was in that respect additionally improper. When a paraphrase is used it should clarify and not defeat or render meaningless the original.

No. 24 (R. 106) was also a corrupted and erroneous paraphrase of the *Shanks case test*, but much worse than the two above referred to. It told the jury that plaintiff's work was in interstate commerce if he were "*performing a service for the defendant which was reasonably necessary in aid and furtherance of interstate commerce.*"

In *Industrial Comm. v. Davis*, 259 U. S. 182, 186, 187, the *Shanks case test* is quoted and adopted, and it is carefully explained that employes may not be within the *Act* even when performing work in shops which are accessories to interstate commerce and necessary to it, for all employes of interstate railroads are necessary to such movement, but that they are only within the Liability *Act* when within the "*transportation*" test, which is the true test.

The instruction complained of, in the light of these decisions, is not only incorrect, but almost meaningless, and well calculated to and undoubtedly did mislead the jury; especially when coupled with counsel's argument to the jury that the word "*transportation*" is not to be found in the *Act* and that the court would so instruct, etc. (R. 101).

I.

Error in Overruling Objections to and Allowing Misstatements of Facts to be made to the Jury.

One of the witnesses for plaintiff was McManaman, defendant's switch foreman in charge of the movement of the engines to and from the coal-chutes. Negligence was charged against the defendant for moving the engines at the time in question without first ringing a bell. *McManaman was not asked and did not testify with reference to that matter.* Plaintiff's counsel, in his argument to the jury, stated that McManaman had testified that the bell was not rung. Defendant's counsel objected to the misstatement and the trial judge stated that he did not remember that the witness had so testified, whereupon plaintiff's counsel again and emphatically stated that he had, and defendant's counsel again objected, but was *overruled* (R. 98-100), and the court, over defendant's objections, allowed counsel to argue, again and again, and to repeatedly state positively that McManaman had so testified (R. 98-100). The record was duly protected in accordance with the Illinois[*] practice and the alleged error was passed upon by the Appellate Court adversely to defendant. The only testimony that the bell was not rung was that of plaintiff himself, which was negative and so weak as not to amount to even a scintilla of evidence (R. 29, 30, 32). Added importance is given this error by the Appellate Court's decision on the question of assumption of risk, to the effect that it had been *customary* to ring a bell and that therefore plaintiff did not assume the risk caused by a failure to follow such custom; 268 Ill. App. 545, commencing at bottom of page 556, and especially the case supposed to govern, *Wasiwila v. Ill. Cent.*, 220 Ill. App. 113, 118, and the quotations from that case. The Appellate Court (top of p. 557) says:

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[*] "It was not necessary to constantly interrupt counsel and repeat the same objection after a ruling had once been obtained. Such conduct on the part of counsel for defendant would have been improper, and no right was lost by failing to adopt such a course." *Chicago, etc. v. Lewis*, 216 Ill. 176, 180.

> "The testimony on the part of appellee [plaintiff] is to the effect that no warning, by the ringing of a bell or otherwise, was given prior to the movement of the engine which resulted in his injury. The evidence on the part of appellant was to the effect that the bell was rung. It was therefore a question for the jury as to whether said bell was rung or other warning given."

In view of the above quotation we fail to understand how that court could come to the conclusion that the error of the trial court in overruling defendant's objections and allowing counsel to make and repeat the misstatements in question was other than highly prejudicial to defendant. The plaintiff's right to recover, if he had any, depended upon the claim that a bell was not rung before the movement in question was started. There can be no doubt but that the arguments complained of convinced the jury that McManaman, the man in charge of the engines, testified that the bell was not rung. In the Appellate Court counsel for plaintiff conceded that the witness did not so testify (R. 139), and such is the *fact*.

J.

Excessive Damages;

Erroneous Instruction on Damages.

The verdict awarding $37,500 damages indicates that the jury were influenced, both as to liability and as to damages, by erroneous instructions on the subject and by passion and prejudice.

In this connection we ask the indulgence of the cour to treat, out of order, the erroneous instruction. At th request of plaintiff the trial court charged the jury (R. 10 as follows:

> "[illegible]. The court instructs the jury that, * * * in assessing the plaintiff's damages, if any, the jur should take into consideration * * * *any loss of health* or strength, if any, *which the jury may believe from the evidence the plaintiff has sustained* or will sustain as a direct result and consequence of such injury, if any; also *the value of the plaintiff's time lost, if any, by reason of such injury and his inability, if any, to work and earn money in the future* so far as any of the above mentioned elements of damage, if any, have been charged in the plaintiff's declaration and shown by a preponderance of the evidence; * * *"

Plaintiff testified (R. 88) that the general condition of his *health* since this injury has been very poor, and that when he left the Yellow Cab Company in Chicago he did not continue in its employ in Evanston; that his *health fell down*. Both of these statements were purely self-serving and they are not consistent, for he testified to a long period of work in the service of the Yellow Cab Company notwithstanding the testimony that the general condition of his health since the injury had been very poor; and that it was because his *health fell down* that he left the service of the Yellow Cab Company in Chicago and did not continue in its service at Evanston. There is in the record no corroboration of either statement and not the slighest connection between the injury in question and either the general condition of his *health* or the falling down of his *health*, which latter, he says, made it impossible for him to accept the reduction in his wages proposed by the Yellow Cab Company from $17.50 to $12 a week. The jury considered from the charge that plaintiff had proved a total disability for the rest of his natural life. And even then, the damag are grossly excessive, yielding as they would an income of $2,000 a year and leaving the principal intact at the end of plaintiff's life.

3.

Respondent's Contentions.

We assume that in his Reply to Petition for Writ of Certiorari counsel for respondent has stated his position on the various questions involved. We below discuss his contentions in the order in which they are there stated, pages 9-20.

Because of his reference to the case of *Spencer v. Chicago & North Western Ry. Co.*, 336 Ill. 560, we feel called upon to say that that decision in no way affects our contention here, namely, that the decision below, following the decision of the Supreme Court of Illinois in this case (374 Ill. 479, 482), makes it the law of Illinois, in cases under the Liability Act, that:

> "Whether or not at the time of the accident plaintiff was employed by defendant in interstate commerce was a controverted question of fact upon which plaintiff had a constitutional right to a trial by jury. * * * Whenever an issue is made in a case and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony."

To which rule the Appellate Court added (299 Ill. App. 545, 553):

> "* * * or the evidence may be agreed upon or embodied in a stipulation of facts."

The *Spencer* case, which counsel says shows that neither the Supreme nor the Appellate Court of Illinois meant what it said in the foregoing quotations, was decided by

said Supreme Court October 12, [illegible], whereas it deni
our application for review in the case at bar on Februa
17, 1921; and denial of such an application is, "in effec
at least, an affirmance of the Appellate Court's concl
sions and judgment. As such conclusions and judgmen
are based upon the Illinois Supreme Court's decision in th
case ([illegible] Ill. 470), the latter court's denial of our appl
cation for certiorari was an affirmance of such concl
sions and judgment. *Boden v. Clancy*, 269 Ill. 95, 102; *Peo
ple v. Green*, [illegible] Ill. [illegible], [illegible]; *Minneapolis, etc. v. Ro*
270 U. S. 410, 411-12; *C. & O. Ry. Co. v. Mihas*, 280 U.
102.

On p. 13 of his Reply to Petition for Writ of Certiorar
counsel for plaintiff says that the *Shanks*, *Harringto*
Cousins, *Nash* and *Erickson* cases are easily and readil
distinguishable from the case at bar,

> "in that in none of these cases was the plaintiff en
> gaged in *the operation of an instrumentality of inter*
> *state commerce or in preparing it for use as such*."

Which, we take it, means that it is his theory that th
plaintiff was either operating or preparing for use an in
strumentality of interstate commerce; in other words, tha
the heating-plant was itself an instrumentality of interstat
commerce. Such a theory is out of line with all judicial
authority.

On pp. 11 and 20 counsel attempts to uphold the theor
of the state trial and appellate courts that the couplin
of the heater-engine to the other engines, forming, as h
says, "a train," had a bearing on, as determinative o
the character of plaintiff's work.

The theory is based, first, upon the fact that the pu
pose of heating of the other engines was to prepare the
by [illegible] them with coal, for later work in intersta
transportation, and secondly, upon such fact impressed up
the "train" of engines, including the heater-engine, th

character of an interstate train. This, of course, binds him then to the contention that because this train was an interstate train, all of the employes on it, whether having to do with its operation or not, were employed in interstate commerce, because of "the unitary character of the movement of the four engines," etc. But, this is a plain *non sequitur*. It is true that one car containing interstate shipments, in a train otherwise all intrastate, makes the operation of the train a movement in interstate transportation, and brings within the Act each member of the train crew whose work has to do with such operation; but it does not make the cars containing the intrastate shipments interstate, nor bring within the Act any employe on the train not concerned with the operation of it. As well say that an employe of this railroad whose work has no relation to interstate transportation is within the Act while, in the course of his employment, he is riding between two intrastate points on an interstate train.

Counsel says, on pp. 11 (bottom) and 12 of his said brief, and again on p. 20, that on this "train" of engines plaintiff directly participated in its movement; (p. 20) that his presence was necessary to the movement of these engines to and from the station; that the duties which he performed on the heater-engine were essential to the proper movement of the "train," and that "his work was essentially the same as that performed by the train employes in charge of those engines." These statements are all contrary to the evidence, and are not justified by any evidence. Counsel adds to these the statement, at the bottom of p. 20 and top of p. 21, that the heater-engine, except for the accident, would next have been used to propel the [illegible]. As to this we call attention to the only testimony on the subject (R. 77):

> "If I was going to spot the third engine from the south the [heater-engine] I would use that engine to spot it."

That testimony was by Kuspers, the *locomotive fireman* who was operating the most southerly engine and who operated that engine to move the string each time that they were operated in a southerly direction. It directly denies the theory of counsel and corroborates the testimony of plaintiff himself that plaintiff at no time had anything whatever to do with or any participation in any operation or movement of the engines at any time on the trip. It shows that if it had become necessary to use the heater engine to move the engines Kuspers would have had to get into it and do it. As plaintiff testified (R. 35):

> "On all of this whole trip * * * my engine was just being hauled or pushed by the other engines. I didn't know anything about operating it. The power wasn't connected up on my engine at any time on the trip."

The work of a train man, or member of a train crew, engaged in operating a train in which there is an interstate shipment is work in interstate transportation. Whatever he does in connection with the operation of that train has to do with that shipment—its transportation between the states. But here, plaintiff's work had nothing to do with the operation or movement of the heater-engine or any of the engines; nothing was being transported interstate by these engines or any of them; the whole movement was intrastate; if the operators or directors of the movement (the members of the switch crew) were engaged in interstate commerce it was because they were assisting in the coaling of the three other engines for later interstate transportation by them and so came within the second part of the *Shanks* case test; plaintiff had nothing to do with the coaling of those other engines and his work had no relation to it. As was said by the court below the first and second times this case was before it, and before the Supreme Court of Illinois had made it impossible for it to say it again:

> "The fact that his engine had a physical connection at the time of his injury with those other engines which were being prepared for interstate transportation cannot be said to have been in furtherance of interstate transportation. Appellee was not preparing his engine for interstate transportation nor was he doing anything in any way related to interstate transportation. His engine was being operated [illegible] not for motive power but purely to generate heat, to warm appellant's depot and other buildings."

The heater-engine was not taken to the chutes because the other engines needed coal; plaintiff did not accompany the heater-engine to assist in coaling the other engines; the heater-engine was not being coaled to transport or move anything, even itself.

Counsel for plaintiff in substance admits that if this Court meant what it said in the *Shanks* case his [illegible] not within the Act, and relies upon the case of *Erie R. R. Co. v. Collins*, 253 U. S. 77, to demonstrate that the use by this Court of the word "transportation" in the *Shanks* case test was not intended as interpretation of the Act; that this Court often uses the words "commerce" and "transportation" interchangeably in opinions since the decision of the *Shanks* case. See his brief in reply to petition for writ, pp. 12, 23-24. On p. 12 he says no distinction between the words has been recognized by this Court, "as evidenced by its decisions subsequent to the *Shanks* case, in which the terms are often used interchangeably." On pp. 23 and 24 he makes substantially the same statement and attempts to support it by a quotation from the *Collins* case, and, on p. 24 says that otherwise this Court "would not have expressed the views or reached the conclusions that it did in the cases of *Erie R. Co. v. Collins*, 253 U. S. 77; *Erie R. Co. v. Szary*, [illegible] U. S. 86, and *Philadelphia B. & W. R. Co. v. Smith*, [illegible] U. S. 101, as to the great majority of cases where the employment was held to have been in interstate commerce.''

It is because of these statements that we have elsewhere burdened this brief with a review of all of the decisions of this Court involving the question of the applicability of the Act. We feel that the statements are incorrect and without support in the decisions. Of the three cases counsel cites to support them we refrain from comment on the Smith case because of its obvious irrelevance. We here call attention to the differences on the facts between the case at bar and the *Collins* case and its companion the *Szary* case.

Collins (253 U. S. 77) and *Szary* (253 U. S. 86) were held to be within the Act because they were engaged when hurt in operating instrumentalities that furnished to actual transportation things necessary to effect such transportation, namely, water in the *Collins* case and sand in the *Szary* case. Pumping the water into the tank from which it was taken into the boilers of interstate locomotives then and there actually moving goods and passengers between the states, was supplying a vital need without which those locomotives could not produce movement—could not transport such goods and passengers. And *Szary's* sand, though not *itself* vital to producing movement was yet vital to regulate and control movement.

With these cases compare this. Bolle was the janitor or fireman of a central heating-station or plant, from which extended permanently-placed, underground pipes through which the steam generated by the fire he tended and mended was conducted to various places and things or instrumentalities and thereafter was by others used or not as occasion should seem to them to require, to *heat* certain buildings, stationary box-cars, and other things (R. 37- 42-3, 48-51, 51-2, 53-4, 55-7, 59.)

As to whether the so-called "other duties" of plaintiff, said by the court below to make a jury question of the character of his employment, namely: "watching engines in the roundhouse, [*]sanding them, turning turntables, and other duties in the roundhouse with reference to engines engaged in both interstate and intrastate commerce" (324 Ill. 479, 255 Ill. App. 646), or "turn turntables, build fires in locomotives and watch engines * * * to see that the engine was supplied with plenty of coal and water" (Reply to Petition for Writ of Certiorari), have the effect of bringing respondent within the Act, we feel that they do not, first, because of plaintiff's own testimony, on cross-examination (R. 24-5):

> "* * * if I seen Tony do anything like build a fire or watch engines or turn turntables, if that work was required to be done and Tony was busy I would do it. It was during the times that Tony went to Beach to get coal and water that I done the things I had seen him do while he was there. It was only when he was away at Beach that I did those things, built fires, turned turntables and watched engines. [This is the only evidence in the record that Tony ever went to Beach at any other time than on the day of the accident.] I was hired to fire the stationary boiler."

and, second, by the decisions of this Court. *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 477-8; *Shanks v. Delaware, etc.*, 239 U. S. 556, 558. The Liability Act is for the benefit of employes who are injured when the particular service in which they are employed at the time of injury is in interstate commerce.

It is here to be noted that what plaintiff was doing at the time of his injury had only to do with furnishing the heating-plant and had nothing at all to do with the "other duties" below equally stressed as governing the question.

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[*] There is no testimony that plaintiff ever sanded any engines.

We do not contend that the trip to the coal-chutes wa not a part of his work of firing the heating-plant. A to that he was in much the same position as *Szary* (25 U. S. 86) when dumping the ashes, which this Court said was a part and necessary incident of his tending the interstate engines. But we do contend, upon the authority of this Court's decisions, that that trip of the helper-engine was a part and necessary incident only of firing the heating-plant, and that the so-called "other duties" have no bearing on the question under consideration.

Counsel for plaintiff fails to make clear his position as to these "other duties." He seems to abandon the thought of the Illinois Supreme Court on the subject, which was (and it was adopted by the court below) that the question of interstate commerce was for the jury largely because of these "other duties," whereas, on p. 10 of his said brief counsel says that the "general employment" was that of heating the depot, etc., and that *the trip to* [illegible] *was incidental thereto;* that because the heating was in interstate commerce the trip was also.

If intended as an abandonment of the contention that the "other duties" made the question of interstate commerce for the jury, it means that here the "other duties" are out of the case. From which it would seem to follow that error is confessed, for, so far as anyone knows, the jury's finding that plaintiff was within the Act is based on those "other duties," and it is certain that the Illinois Supreme Court based its decision upon them, and the decision here under review adopted the decision, opinion, conclusions and statements of fact and law of the state Supreme Court.

At p. 13 of his said brief counsel cites as support for his contentions of the interstate character of plaintiff's work three decisions of this Court, namely, the *Parker*, *Puckett, Smith, Collins, Seary, Winters, Winfield,* and *Carr* cases. In the order given they involved employes and work as follows:

Parker. Fireman of switch engine moving intrastate car to get at and move an interstate car. Held, the purpose of the movement governed.

Puckett. Employe clearing wreck from interstate track.

Smith. Interstate bridge crew, housed and moving from place to place in a special car to expedite the work. Plaintiff, a member of the crew, hurt while cooking meal for the crew.

Collins. Pumping water for interstate locomotives.

Seary. Sanding interstate locomotives.

Winters. Repairing an engine withdrawn from transportation for general repairs.

Winfield. That the parties both were engaged in interstate commerce was admitted. The question for decision was whether such an employe was entitled to compensation under a State Act when his injury was not due to negligence.

Carr. Brakeman of an interstate train cutting out of it an empty car so the train could proceed interstate.

Counsel for plaintiff appeals (pp. 20-24 of his said brief) to his main caption and the cases therein and others referred to certain other matters said by him to have a bearing upon and as supporting his contention that his client was within the Act, namely:

1. P. 20, that brief. That the operation of the "tester" of four engines was a necessary preliminary movement in aid and furtherance of interstate commerce.

At the trial we objected to testimony tending to show that the engines which hauled the heating-plant to the chutes, after they were coaled, might be used in interstate transportation, but were overruled. We requested the court to instruct the jury that that fact had no bearing on the nature of plaintiff's work, but were refused. Those are errors here assigned. Counsel cites no cases. Plaintiff testified (R. 44):

> "On all of this whole trip, from the roundhouse until I got hurt, my engine was just being hauled or pushed by the other engines. I didn't know anything about operating it. The power wasn't connected up on my engine at any time on the trip from the roundhouse up to Beach."

It would seem to be too clear to admit of argument that unless plaintiff's work had to do with supplying those active engines with coal for their anticipated later employment in interstate transportation the fact that they were to be so later employed has no bearing on the character of plaintiff's work. It is the purpose of *plaintiff's* work that determines the question. He had nothing whatever to do with operating or coaling those engines, or any connection of any kind whatever with their interstate or other character or with the work or its purpose of the men who took them to the chutes for coal. It is even doubtful that those men came within the test, but that is not material here.

2. P. 21, that brief. Counsel says, in effect, that plaintiff, not defendant, was entitled to a directed verdict on the interstate commerce question; that as a matter of law he was within the Act, because the facts fully satisfy the test laid down in the *Shanks* case. We have attempted herein to demonstrate to the contrary. The court below has gone no farther than to hold it a question for the jury, and

it will be remembered that in his argument to the jury counsel said (R. 101):

> "Counsel * * * uses throughout his argument the word 'transportation,' as if the word 'transportation' added some charm to the definition. Interstate commerce is a good deal more than transportation. The federal statute uses the word interstate commerce. Listen to the court's charge on that subject. When the court, in his instructions, tells you what the law is, he will give you the language of the federal statute, and the word 'transportation' is not in it."

3. P. 21, that brief. Counsel contends that "if reasonable minds could draw different inferences from the facts and circumstances in evidence as to whether respondent was so engaged, the question was properly submitted to the jury," citing this court's decisions in the *Lloyd, Zachary, Carr, Welsh,* and *Donat* cases.

No matter what may have been said in those cases, we think that if no essential fact is in dispute the question is one of law. As to this we stand principally upon what this court did and said in the *Behrens* case (233 U. S. 473, 475) in treating and answering the *question of law* certified to it by the Circuit Court of Appeals, and what this court said in the *Hancock* case (253 U. S. 284, 285) viz.:

> "The essential facts are not in controversy; the nature of the employment, therefore, is a question of law."

Furthermore, we respectfully suggest that it is elementary that whether the provisions of a legislative act apply under stated facts is a question of law.

Under the second caption of III, p. 21 of his brief, counsel, on p. 22, cites and quotes from *Industrial Commission v. Davis*, 259 U. S. 182-188, presumably to show that the question is too difficult for a court to determine. It is true that in the opinion in that case (involving repairing

a locomotive withdrawn from commerce) this Court sai
of prior decisions that "we may say of them at once th
a general ruling, one that enables an instant and undis
puted application, has not been attempted to be laid down,"
but it also said, p. 186:

> "The test of the employment and the application of
> the Federal Employers' Liability Act is, 'was the em-
> ploye at the time of the injury engaged in interstate
> transportation or in work so closely related to it as to
> be practically a part of it?' *Shanks* v. *Delaware,*
> *Lackawanna & Western R. R. Co.,* 239 U. S. 556."

And again, p. 187:

> "In other words, we are brought to a considera-
> tion of degrees, and the test declared, that the employ
> at the time of the injury must be engaged in inter
> state transportation or in work so closely related to
> as to be practically a part of it, in order to displac
> state jurisdiction and make applicable the federal act."

Counsel urges in his said brief, p. 28, that in the *Shank*
case it was not the intention of this Court to make th
"distinction" between "commerce" and "transportation"
we are "seeking to make" in the case at bar, and quote
from the opinion in the *Collins* case the test of the *Shank*
case as it therein is made to appear in 253 U. S. 77 at p. 8
with the bracketed words "interstate commerce" appar
ently used to interpret the "it" which precedes them.

We have elsewhere in this brief called attention to th
necessity that existed at the time of the *Shanks* decisio
for a more specific and restrictive definition of interstat
commerce in the sense intended by Congress in the Lia
bility Act, and, we believe, fully answered that contentio

The decisions of this Court in these cases classify them
selves. There are, among others, (1) the cases hav
ing to do with actual transportation and in whi
the question for determination was whether it w

interstate or intrastate; (2) those involving repairs of roadbeds and bridges, primary instrumentalities of transportation, in use in interstate transportation, and in which, no matter what the language of the opinions, the vital question always was whether, at the time of the injury, the instrumentality was then and there in use in such transportation; (3) those involving repairs and upkeep of locomotives and cars, primary instrumentalities of transportation, and in which the determination of the question depended always upon whether they were then in use in interstate transportation or had been withdrawn therefrom and were not so in use at the time of the injury; (4) those involving new construction; and (5) those involving work too remote from interstate transportation to be considered a part of it.

We believe it to be demonstrated that the case at bar is in the last-named class.

As to the part of counsel's said brief numbered V to X, pages 24-28, we here make no extended reply. The points are argued in this brief.

However, as to the four federal court decisions which he cites under V (Defendant's Negligence) they seem to be not in point.

As to his claim of a duty to warn plaintiff he cites no federal decisions, and it is not the law that duty requires a master to instruct an inexperienced servant not to do things that his employment does not require or reasonably seem to require. Petitioner could not reasonably have foreseen that respondent would do what he was doing at the time of his injury. After an injury it is easy to say that warnings and instructions might have prevented it, but that is not the test of whether a failure to warn is negligence. As said in Milwaukee etc. v. Kellogg, 94 U. S. 469, "In order to warrant a finding that negligence is the proximate cause of an injury it must app that the injury was the natural and probable consequ of the negligent or wrongful act, and that it ought to h been foreseen in the light of the attending circumstances," or as said in *Atchison, etc. v. Calhoun*, 213 U. S. 1, "It h been well said that if men went about to guard themselv against every risk to themselves or others which mig by ingenious conjecture be conceived as possible, hu affairs could not be carried on at all. The reasonable ma * * * will order his precaution by the measure of what appears likely in the known course of things." And that is the rule here, for in cases under the Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts. *C. M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472; *N. O. & N. E. etc. v. Harris*, 247 U. S. 367, 371; *G. M. & N. etc. v. Wells*, 275 U. S. 455.

As to assumption of risk, counsel takes about the same position as that of the court below, namely, that on the facts in this case "the risk of the negligent act or acts of defendant's employes" arose suddenly and unexpectedly, and were contrary to a custom familiar to plaintiff. This is not borne out by the record, as we think we have demonstrated. The federal decisions cited by counsel under this caption uphold our contentions, not his.

As to instructions refused and given, we think that counsel says nothing justifying a reply and that we have hereinbefore demonstrated that the case was not submitted to the jury under proper instructions.

As to counsel's points VIII, IX and X, no reply seems necessary for what is there said appears to have no bearing on this review.

Wherefore, we respectfully submit that the judgment below should be reversed.

Ray N. Van Dusen,
Sanford H. Cady,
Counsel for Petitioner.

Nelson J. Wilcox,
Of Counsel.

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[illegible]

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1931.

No. 60
(Docket No. 917)

Chicago and North Western Railway Company,
Petitioner,
vs.
Eugene Bolle,
Respondent.

MISSTATEMENTS IN RESPONDENT'S BRIEF.

Ray N. Van Doren,
Samuel H. Cady,
Nelson J. Wilcox,
Counsel for Petitioner.

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 60, October Term, A. D. 1931.

Chicago and North Western Railway Company,
Petitioner,
vs.
Eugene Bolle,
Respondent.

MISSTATEMENTS IN RESPONDENT'S BRIEF.

We know that there is no rule authorizing petitioner to file this document, but we are handing it to the Clerk with the thought that if it will be of assistance to the Court our time and expense in preparing and printing it will have been well spent. Its only purpose is to prevent misunderstandings due to misstatements in Respondent's Brief, among others the following:

Page 6, middle. He says that our statement on page 5 of our brief that "all of the movements approaching and at the chutes were made on the lead and instructions of the 'coal-chute man,'" is based on the testimony of petitioner's witness Fleming, given on a former trial but repudiated on the present trial. This is not so. Our statement was and is based on the testimony of respondent's own witness Williamson (R. [illegible]), as follows:

"We found out regularly and ordinarily from the coal-chute man at which one of the two chutes we were to take our coal. We found that out on the night of

> the accident. * * * With reference to all of the [illegible] after our engines got through the crossover [illegible] of the coal-chute, the coal-chute man directs [illegible] movements. He gives his directions to the engine [illegible] This coal-chute man was there on the job this [illegible] in question and before this accident happened, giv[illegible] these directions. He gives his directions verbally [illegible] know he was giving them that night because I [illegible] them. I was on the northbound main track, 10 or [illegible] feet away from the engine, on the side away from [illegible] coal-chute, the engines being between me and the [illegible] chute man. I could hear him giving directions to [illegible] ating the engines, as to which slide to use, and whe[illegible] to back up or move forward and so on. * * * After [illegible] coal-chute man put up his slide I heard him tell [illegible] operator of the engine Kucera was on, the second [illegible]gine from the south, to back up."

Page 7, middle. He says that the statement made by [illegible] on page 8 of our brief, to the effect that neither the co[illegible] chute man nor the operator of the engines at the time [illegible] question could see Bolle from their positions, and that th[illegible] is clear and uncontradicted, is not supported by any e[illegible] ence except that of the coal-chute man and the opera[illegible] of the engine, and that the physical facts are to the co[illegible] trary. This is not so (R. 47-8, 68, 70-1, 80). As to demo[illegible] stration by the physical facts, the exact contrary of wh[illegible] counsel says is true. The heater engine, to the back [illegible] of the cab of which Bolle was clinging, was headed [illegible] The engine on which were the coal-chute man and its op[illegible] ator was south of the heater-engine and was headed [illegible] they faced each other, so to speak. Between Bolle and th[illegible] other two men were the cab of the heater-engine, the w[illegible] length of the boiler and the pilot of the heater [illegible] plus the protuberances on the top of the boiler, su[illegible] the sand-dome, the bell and the headlight, the two pilots [illegible] whole length of the boiler of the more southerly of [illegible] two engines, the protuberances on the top of the boiler [illegible]

[illegible] out of the engine. There were two men who [illegible] of the water engine, there [illegible] lay of the [illegible] and the windows would reflect that light so that looking through them would be much the same as looking out through the window of any lighted room into the night. Perhaps most persuasive of all, however, are the facts that it was nighttime and dark, Hollo was a long distance away from these other men, and he had no lantern. Furthermore, there was no occasion for these men to keep a lookout for persons clinging to any of the various parts of the engine ahead of them.

Page 6, top, pages 17, 18, and elsewhere in his brief, he refers to testimony of petitioner's witnesses given at other trials of the case. It is difficult for us to comprehend whether counsel offers these references as affirmative evidence. However, it is our understanding that they are not.

Page 15, bottom—page 16, top. He says that the maintenance of way car was used for the purpose of maintaining the tracks, signalling devices, etc. If this is a belated misstatement its purpose is obvious in connection with counsel's reliance on the case of *Philadelphia etc. v. Smith*, 250 U. S. 101 as controlling here. See pages 18, 19, 20, and 21 of his brief. The maintenance of way car was not a car in any sense except that it once had been part (the upperworks) of a box car. It was a stationary building. It was not used for the purpose of maintaining the tracks, signalling devices, etc. The reference to the record given by counsel (page 16), which concerns a part of the testimony of petitioner's brother, the night foreman of the roundhouse. An examination of what he says on that page shows that he said only [illegible] the maintenance of way car was located at one, that he thought it was [illegible] for keeping supplies for bridges and switches and things like that used around the tracks in the [illegible] of way car, in the maintaining of the tracks, etc, and s nalling devices." From which it is seen that (1) ther no testimony in the record that the maintenance of w car was heated at all, and (2) at most it was a storeho for materials.

Page 16, top. He says that in the regular course of h employment plaintiff turned turntables for engines us in both classes of commerce, and fired and watered th engines. It is true that on his direct examination plai tiff's testimony gives the impression that his chief duti in the roundhouse were connected with matters not involv ing the heating plant. The court below seems to hav read that part of the record, for it says that:

> (R. 168) "His duties consisted of watching engine in the roundhouse, sanding them [although there is a word of testimony in the record that he ever sande an engine], turning turntables, and other duties i the roundhouse with reference to engines in both i terstate and intrastate commerce. He also fired th stationary boiler, or the locomotive engine which wa substituted when the boiler was out of service. * * (R. 170): It will be observed that appellee's genera duties consisted of 'watching engines in the roun house with reference to engines engaged in both inte state and intrastate commerce. He also fired the st tionary boiler or the locomotive engine which was su stituted when the boiler was out of service,' " etc.

But it should be remembered that "his duties" and hi "general duties" as referred to by the court below, and o which the decision was grounded, faded to the vanishin point on plaintiff's cross-examination, as pointed out i our brief, page 69, under the heading "K. Responden Contentions," when he said that it was only when Tony w away at Busch that he "did those things, build fires, tu turntables and watched engines," and "I was hired to fi the stationary boiler."

Page 17, near top. He attributes to us a suggestion we have not made, namely, that in the *Pedersen*, Smith, Barry, and Collins cases this Court used, instead of the second part of the Shanks case test, the following language:

> "* * * so closely related to interstate commerce as to be practically a part of it."

A reference to pages 90-1 of our brief shows that nothing of the kind is there said. On the contrary, there and here, then, now and always, we state that this Court, from the Shanks decision on, or since January, 1916, has strictly adhered to the Shanks case test, namely:

> "The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

Page 27, bottom. He says that it was stipulated by the defendant on the trial that the three engines to which plaintiff's engine was coupled made the trip to the coal chutes to be coaled for later engagement in both classes of commerce. This is true, but might be misleading, because it says nothing about that stipulation having been subject to defendant's objections, which were overruled. The stipulation was made, subject to the objections, for use by plaintiff at the trial in the event that the trial court should overrule the objections, and to expedite the trial and make it unnecessary, in that event, for plaintiff to procure the attendance of witnesses who could testify to the facts set out in the stipulation.

Page 37, near top. He says that the witness [illegible] did not testify that the period during which he knew of [illegible]'s presence on top of the engine, and during which he might have done something but did nothing, was between the time of his discovery of Bolle and the time when the coal-chute man gave the order to move the engines.

As pointed out in our brief, pages 45-6, McManaman testified that he heard the coal-chute man give the order to move the engines, and that "at once after the order was given" the engines were moved north, and that "that is what the order meant; he followed that order as soon as it was given." That testimony is not ambiguous and in the natural course of things the movement *would* immediately follow the order. It is true that the record also shows that McManaman said that he had time after he discovered the man on the engine, "and after his order was given," to do something, etc. However, it is apparent that he did not mean that the interval of time in question was between the giving of the order to move and the actual movement, because he denied that flatly, as above shown, and he also testified that during the interval, whenever it was, he did nothing because he didn't think they would move the engines while the man he thought was the coal-chute man was taking coal into the heater engine. He would not have said that if the interval he was talking about occurred after the coal-chute man had ordered the movement, which, as he says, meant that the movement should be made at once.

Page 39, bottom. He says that if Terasky's statement, that he didn't order Bolle to take water, is true, then our argument that in taking water plaintiff did not act on his original instructions must fail. In this connection it is to be noted that we have said nothing about Terasky's denial of plaintiff's statement that he (Terasky) ordered him to take water, but have assumed, as here in this connection we must, that plaintiff's statement of the fact, and not Terasky's, is true.

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And the sentence beginning at the bottom of page 59 is not warranted and is not fair to us. In our brief in this case we have assumed the truth of the testimony of plaintiff with respect to every fact except that he placed himself in the position he was in at the time of the accident for the purpose of taking water. The truth of that cannot be assumed, because it is contrary to the physical facts, and on his cross-examination he stated that water could not be taken at that place, and that he knew that it could not, but still insisted, and his counsel in his brief now insists, that he got up on the rim of the coal bin, just back of the cab, and rode there, clinging to the roof of the cab, for the purpose of finishing the task of taking water into his engine when it should again arrive at the water standpipe.

Respectfully offered,

Ray [illegible] Van Dorn,
Samuel H. Cady,
Nelson J. Wilcox,
Counsel for Petitioner.

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([illegible])

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1931.

No. 60.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

EUGENE BOLLE,

Respondent.

Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari.

JOSEPH D. [illegible],

Counsel for Respondent.

[illegible]

IN THE

Supreme Court of the United States

October Term, A. D. 1931.

No. [illegible]

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

EUGENE BOLLE,

Respondent.

Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari.

May It Please the Court:

Your petitioner, Eugene Bolle, suggests that there is a diminution of the record in the above entitled cause and respectfully moves that this Honorable Court issue its writ of certiorari herein directed to the Appellate Court of the State of Illinois, Second District, commanding that Court to certify and send to this Court certain papers which are of record in that Court in this cause. These papers are particularly described as follows:

Excerpt from argument of counsel for plaintiff, pages [illegible] and [illegible], original transcript of record.

Excerpt from argument of counsel for defendant, page [illegible], original transcript of record.

Reasons for This Motion.

1. *These excerpts are a part of the record and are important and necessary to a decision on the merits of this cause.*

2. The questions raised in this Court in this cas
quire for their proper understanding and de
that these papers be before this Court.
3. The transcript of record filed herein contain
cerpts from the argument of counsel for the
Eugene Bolle, and assigns error thereon, but
tains no reference to or excerpts from the argu
of counsel for the said Chicago and North We
Railway Company in reply to the aforesaid
ment.
4. These excerpts are necessary to show the po
of counsel in respect to the matters raised in
argument before the Trial Court, which is diff
from and opposed to the position of counsel t
in the Court of Review and the position which c
sel will take in this Court.

Wherefore your petitioner prays that a writ of cer
rari be issued out of and under the seal of this Honor
Court directed to the Appellate Court of the State of
nois, Second District, commanding that court to certify
send to this Court the papers enumerated herein.

Joseph D. Ryan,
Counsel for Eugene

I, Joseph D. Ryan, counsel for Eugene Bolle in the
entitled cause, do solemnly swear that the facts recit
the foregoing "Suggestion of a Diminution of the R
and Motion for a Writ of Certiorari" are true.

Joseph D. Ryan,
Counsel for Eugene

Subscribed and sworn to before me this 10th day
tember, A. D. 1931.

Edith W
Notary Public, State of

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Office Supreme Court, U. S.
FILED
MAY 25 1931
CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

October Term, A. D. 1930.

No. ~~[illegible]~~ 60

CHICAGO AND NORTH
~~GRAND TRUNK~~ WESTERN RAILWAY COMPANY,

Petitioner.

vs.

EUGENE BOLLE,

Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

JOSEPH D. RYAN,
Attorney for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930.

No. 917.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Petitioner,

vs.

EUGENE BOLLE,
Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

STATEMENT.

For convenience we shall refer hereinafter to the petitioner as defendant and to the respondent as plaintiff.

It is not believed that defendant's petition contains an unbiased and complete statement of the facts and we, therefore, deem it necessary to present a brief resumé of the material facts in evidence.

History of the Case.

Accident occurred December 4, 1922.

First trial took place December, 1923 (Circuit Court, Lake County, Hon. Claire Edwards, trial judge)

Resulted in verdict and judgment for plaintiff in the sum of $20,000.

October 4, 1924, Appellate Court, Second District, opinion filed reversing and remanding cause on the sole ground that plaintiff was not engaged in interstate commerce.

March 4, 1925, on motion of plaintiff, supported by affidavit that no further evidence could be produced on the question of interstate commerce, the court struck out the remanding portion of its order (235 Ill. App. 330).

April term, 1925, petition for certiorari allowed in Supreme Court of Illinois.

February 16, 1927, opinion of Illinois Supreme Court reversing Appellate Court with direction to either affirm the judgment or reverse and remand the cause (324 Ill. 479).

June 27, 1927, Appellate Court filed modified opinion remanding cause for a new trial (246 Ill. App. 31).

February, 1928, cause retried before Hon. Edward Shurtleff, and at conclusion of all the evidence, the trial court directed a verdict for the defendant on sole ground that plaintiff was not engaged in interstate commerce.

January 31, 1929, Appellate Court opinion filed reversing and remanding cause for a new trial (251 Ill. App. 623).

April, 1929, case retried (third time) before Hon. Claire Edwards, resulting in a verdict and judgment for the plaintiff in the sum of $37,500.

September 23, 1930, opinion of Appellate Court, Second District, filed affirming judgment (258 Ill. App. 545).

February 17, 1931, certiorari denied by Supreme Court of Illinois.

The Facts.

The plaintiff, just 22 years of age, entered the employment of the defendant in its roundhouse in Waukegan, on November 15, 1922. He was born and raised on a farm and had had no previous railroad experience of any kind. He was injured December 4, 1922.

When he first went to work in the roundhouse, he was directed by his foreman to take orders from a man named Tony Terasky and to do as he did. Tony taught the plaintiff how to turn turntables, build fires in locomotives and watch the engines (Rec., 24). Tony also supervised the work of five or six men—enginemen and cinderpit men—when the night foreman was away (Rec., 77).

The night foreman was sick and not at work the night of the accident (Rec., 68). Tony was an old employee and was known as the "engine watcher" in the roundhouse at Waukegan. During the short time the plaintiff was employed by the defendant he worked under the direction of Terasky and properly regarded him as his superior.

By watching an engine is meant to see that the engine was supplied with plenty of coal and water. That was plaintiff's employment for the first few days.

On November 20th he started firing a stationary boiler and at times thereafter he fired a locomotive engine which was used in its stead. These instrumentalities, which were known as the heating plant, heated the roundhouse, passenger depot, baggage room, pipes in the coach yard for heating coaches, roundhouse foreman's office, engineers' and firemen's bunk car, bridge and building bunk car, carpenter's shop, the oil house and turntable in the roundhouse. The pipes in the coach yard were used to supply heat for all coaches that needed heating in the winter time (Rec., 69).

Two or three coaches were customarily taken out of train 151 originating in Chicago, Illinois, and destined to Milwaukee, Wisconsin. These coaches remained in the yard and were heated in cold weather by this heating plant and again customarily moved back to Chicago in a train originating in Kenosha, Wisconsin (Rec., 71, 72). Passengers coming from without the state on through trains frequently disembarked at Waukegan, Illinois, and were then transported to intermediate stations at which the through trains did not stop, in suburban coaches which were heated by this plant (Rec., 72).

These coach yard pipes were connected with the turntable for the purpose of keeping it from freezing in the winter and to prevent the formation of ice on the rails. The turntable was used for turning all classes of engines used in intrastate and interstate commerce (Rec., 73).

On the day of the accident the stationary boiler was out of order and these various buildings and instrumentalities were being supplied with heat by a locomotive engine which was fired by the plaintiff between 4 p. m. and 9:15 p. m. on that date (Rec., 25).

Shortly after 9:15 P. M., the plaintiff told Terasky that the coal in the locomotive was very low and that coal was needed. Just about this time Mr. Gallop, the defendant's traveling engineer, who was recognized by all of defendant's employes as an officer superior to the men and foremen (Rec., 25), came into the roundhouse and in the presence of the plaintiff stated to Terasky that they were about to take four engines to Beach and asked Terasky if he could get a man to ride each one. Terasky said: "The fireman can ride one, the engineer can ride one, I will ride one, and I will get Bolle to ride the other one." Then

Terasky came back and said to plaintiff: "Gene, get up on your engine. We have to go to Beach to get coal and water," and thereupon plaintiff got upon his engine and it was backed out of the roundhouse and was coupled with the other three engines.

These engines were then operated from Waukegan to Beach, Illinois, a distance of four miles, through the open country, over the main line of the defendant (Rec., 25-26). The engines to which plaintiff's engine was coupled were all definitely assigned for use in interstate commerce at the time they started from Waukegan, for the purpose of being supplied with coal (Rec., 21, 22, 23); they were used in such service continuously for several days prior to and following the accident to the plaintiff (Rec., 23).

When the four engines were coupled together they were propelled northward by the most northerly engine which was headed or facing north. An engineer named Fleming was in charge of this engine. The plaintiff was on the second engine from the north and his engine was facing or headed south. The third engine from the north was facing north and Terasky and a member of the regular crew, named St. Martin, rode upon this engine. The fourth engine, or the most southerly engine, was facing south, and an engineer named Kusera was in charge of the latter engine.

While these engines were en route from Waukegan to Beach, plaintiff was required to fire his engine and "look after the water" (Rec., 26). Plaintiff had never performed a similar service and had never been to Beach prior to his injury. When the engines arrived at Beach, they were stopped alongside of a water tank on the main line of the defendant. Terasky, who had been riding on the engine next to plaintiff, directed him, according to plaintiff's testimony, to get on his engine and supply it with water.

(Terasky denied that he gave any such order [Rec., 89-90].) In obedience to this command, plaintiff got upon his engine, adjusted the spout and while the engine was being supplied with water and while plaintiff was standing upon the tender of said engine, the foreman in charge of the operation of these engines, McManaman, ordered him to disconnect the spout as the engines had to be switched from the main line to the side track to let a through train pass (Rec., 26-27). The order to disconnect or lay aside the spout was given the plaintiff when the tank was only partly filled with water and he so informed the foreman, McManaman. But the foreman peremptorily ordered him to "Throw it aside."

While this train of engines was standing on the side track, plaintiff got down into his cab temporarily and looked after the coal and water. The engines remained on the side track but a few minutes and were then operated back on the same track toward the water tank. Plaintiff, believing they would again stop at the water tank where he could complete the task that he had begun, of taking water on his engine, again got upon the tender of his engine for this purpose. The engines did not stop at the tank but moved toward the north some distance and on to the east or south-bound main track. (There were but two main tracks at Beach. The north-bound trains being operated on the west track and the south-bound trains on the east track).

The engines were then moved toward the south on the east or south-bound track by the most southerly engine, and were brought to a stop opposite the coal chutes which were situated east of the east track. Plaintiff saw a man standing on the most southerly engine, which was the second engine to the south of him (Rec., 27). He did not, at that time, attempt to put coal in his engine because he was waiting for Terasky, the man from whom he took orders and directions and who was on the engine next to him to the south, to put coal in his engine. It only took about two or three minutes to coal the most southerly engine and this train of engines was again moved southward, a short distance by the most southerly engine. When the engines came to a stop, following the second movement southward, the tender of plaintiff's engine, as well as Terasky's, were stopped directly opposite the coal chutes or slides.

When plaintiff saw the man on Terasky's engine, whom he believed to be Terasky, lower the coal chute of his engine, which was a simple task and accomplished by the mere jerk of a chain, and start coaling his (Terasky's) engine, plaintiff did likewise, jerked the chain, lowered the coal chute, and started to take coal on his engine (Rec., 28). While coal was being emptied into the tender of plaintiff's engine he was standing on the east side of the tender between the engine cab and the coal chute, watching the coal and in the plain view of Terasky or the man who was coaling Terasky's engine.

Plaintiff was also in the plain view of, and was seen by, defendant's foreman, McManaman (Rec., 55, 60). Plaintiff was also directly in the line of vision of the operating engineer on the second engine from the south as it stood facing northward, and there was no obstruction of any kind to prevent the engineer or any of defendant's employes, two of whom were standing close by in the west track (McManaman and St. Martin, a member of the switching crew) from seeing him (Rec., 54, 56, 100).

The process of emptying the coal into the tender made considerable noise (Rec., 28, 65). McManaman, who was called as a witness on behalf of the plaintiff on this trial, testified that he knew there was a man taking coal on plaintiff's engine because he had the chute down; that he didn't, however, at that time, know it was Bolle; but did know he was an employee (Rec., 55); that he saw him there for perhaps one or two minutes before the accident; that he had time, after he discovered him there, to do something, but he didn't do anything because, as he stated, "I didn't think they would do anything while that man was there" (Rec., 60).

While the plaintiff was thus engaged, this train of engines was started and moved northward suddenly without notice or warning to plaintiff, and he was caught and crushed between the cab of the engine and the lowered coal chute.

The movement of this train of engines northward from the side track past the water tank and over on to the east or south-bound track, heretofore described, was made by the most northerly engine as it was headed northward. The two movements southward, as above stated, were made by the most southerly engine which was operated by engineer Kucera, and the movement northward that resulted in injury to the plaintiff, was also made by Kucera, but at that time the second engine from the south, the one immediately next to the plaintiff, and which was headed north, was used as the propelling engine.

Plaintiff's engine was a "live" engine and would have been used in propelling these four engines on the next movement to be made at the coal chutes, if plaintiff had not been injured (Rec., 103).

The orders and directions given by the traveling engineer to Terasky in Waukegan in the presence of the plaintiff and the repetition of the order to the plaintiff by Terasky, preceding the departure of this train of engines from Waukegan for the acknowledged purpose of supplying these engines with coal and water upon their arrival at Beach (Rec., 29, 49), led plaintiff to believe that it was his duty to coal his own engine upon its arrival at Beach. The subsequent order given plaintiff by Terasky at Beach to get upon the tender of his engine and supply it with water, confirmed his belief that it was the duty of the men in charge of these engines, to coal their respective engines (Rec., 29, 48). He knew nothing about the practice of having the coal chute man coal the engines and had received no instructions from anyone other than the directions given him by Terasky (Rec., 26).

Summary of Argument.

Defendant asserts that the decision of the Appellate Court of Illinois "*forced by the decision of the State Supreme Court*" makes it the law of Illinois in all actions brought under the Federal Employers' Liability Act, even when the facts are not in dispute, that the question as to whether such facts bring the parties within the *federal* statute is for the ultimate determination of the jury.

The decision of the Supreme Court of Illinois is not, we submit, susceptible of any such interpretation. That Court did not hold or suggest that the question whether an injured employee is engaged in interstate commerce at the time of his injury should be submitted to a jury in any case where it appears from the evidence, as a matter of law, that the employment was not in interstate commerce. The Court simply held that where reasonable men could draw different conclusions as to whether defendant and the injured employee were engaged in interstate commerce or in intrastate commerce, it would be error for the Court to decide that issue, as all questions of fact should be submitted to the jury under proper instructions as to the law.

That the Supreme Court of Illinois, by its decision in the case at bar, 324 Ill. 479, did not lay down a rule or doctrine in conflict with the applicable decisions of this Court or which would require the jury in all instances to determine the question whether the employment was in interstate commerce, is evidenced by its recent decision in the case of *Spencer v. C. & N. W. R. Co.* (this same defendant), 336 Ill. 560, reversing the decision of the trial and Appellate Courts, holding that the question whether Spencer was engaged in interstate commerce was properly submitted to the jury. Counsel in the case at bar represented the defendant in the *Spencer* case and they well know, in the light of that case, that the Illinois Supreme Court has not made it "the law of Illinois" and did not hold, in the instant case, or mean to be understood as holding, that where it appears, as a matter of law, from the undisputed evidence that the employment is not in interstate commerce, the question should be submitted to a jury for determination.

The Illinois Supreme Court held in the *Spencer* case that under the Federal Employers' Liability Act its jurisdiction is the same as the jurisdiction of this Court (citing cases of this Court on the subject), and that it was the duty of the Court to review the evidence and determine, as a matter of law, whether it was sufficient to sustain the judgments of the trial and Appellate Courts. The Illinois Supreme Court, following an extensive review of the facts in the *Spencer* case, held, as a matter of law, that the evidence was not such as to bring the plaintiff within the provisions of the federal statute. It is apparent, therefore, that there is no basis for the contention that the views expressed by the Supreme Court of Illinois in the case at bar are at all inconsistent with the decisions of this Court.

A petition for certiorari in the *Spencer* case was denied by this Court, 281 U. S. 735.

The question whether employment is in interstate commerce is an ultimate question of fact which, like negligence, assumed risk or other ultimate facts, must be determined from the evidentiary facts. Unless the conclusion follows as a matter of law that the employment is not in interstate commerce and that all reasonable minds must so conclude, the plaintiff is entitled to have his case submitted to the jury. In other words, if there is any uncertainty as to the character of the employment the question is not one of law but of fact.

Defendant's assertion (Petition, p. 27) that "as a matter of self-defense this court should review and reverse the judgment" is an unwarranted reflection upon the Supreme Court of Illinois.

Expressions used in certain cases relied on by defendant (Petition, p. 25) to the effect that where the facts are undisputed or are not in controversy, the character of the employment becomes one of law for the court must be understood as having application only to the particular facts appearing from the evidence in these cases. The decisions in these cases were based upon undisputed evidence showing conclusively that reasonable minds could not draw different conclusions on the subject of interstate commerce.

The record shows, without contradiction, that the three engines to which plaintiff's engine was coupled on the occasion in question were all definitely assigned for use in interstate commerce and that the trip from Waukegan to Beach, a distance of four miles through the open country over defendant's main line, was made for the purpose of supplying them with fuel for use in such commerce. We contend that the operation of the three engines to which plaintiff's engine was attached for the purpose mentioned establishes, as a matter of law, the interstate status of these engines and the men in charge of them. The unitary character of the movement of the four engines and the direct participation therein by the plaintiff also establishes, as a matter of law, the plaintiff's employment in interstate commerce.

In any event plaintiff's general employment was clearly in interstate commerce and the trip to Beach for coal was but an incident thereof.

Obviously, in announcing the test so frequently quoted by defendant, as laid down in the *Shanks* case, 239 U. S. 556, this Court did not intend that it should be given the limited or narrow construction contended for by defendant.

The distinction between "commerce" and "transportation" which counsel are attempting to make in this case, has not been recognized by this Court as evidenced by its decisions subsequent to the *Shanks* case in which the terms are often used interchangeably.

It is manifest from the opinion of the Supreme Court of Illinois in the instant case that the plaintiff's employment at the time of his injury was well within the test announced by this Court in numerous decisions. The duties of the plaintiff are fully and clearly set forth in the opinion rendered by the Supreme Court of Illinois, 324 Ill. 479, and the statement of facts as set forth therein has been adopted by the Appellate Court, 258 Ill. App. 545 (Rec., 168).

Furthermore, it appears from the opinion of the Appellate Court which sets forth the facts found by the Supreme Court (Rec., 168, 169) that the defendant, in its brief filed in that Court in the instant case, did not contend that the facts were not as found by the Supreme Court of Illinois and as set forth in its opinion. The Appellate Court, in its opinion, states:

> "It is not contended by counsel for appellant that the facts are not as above stated, but that, on the facts the finding that appellee was engaged in interstate commerce is not warranted by the evidence."

The principal cases relied on by defendant, namely; *Shanks*, 239 U. S. 556; *Harrington*, 241 U. S. 177; *Behrens*, 233 U. S. 473; *Cousins*, 241 U. S. 641; *Nash*, 242 U. S. 619, and *B. & O. v. Branson*, 242 U. S. 623, are easily and readily distinguished from the instant case, in that in none of these cases was the plaintiff engaged in the operation of an instrumentality of interstate commerce or in preparing it for use as such.

Negligence.

The defendant claims (Petition, p. 7) that the principal negligence alleged and attempted to be proved was the movement of the engines "without the ringing of a bell."

There is but one count, the second, which charges negligence in failing to ring the bell, and this count is based on the alleged violation of defendant's own rule. Other counts of the declaration alleged that the defendant ordered the plaintiff, a youthful and inexperienced employee, to engage in work with which he was totally unfamiliar, without instructing him as to his duties or as to the manner and method adopted by the defendant in supplying the engines in question with coal; that it failed to efficiently supervise the work that was being carried on at Beech; that plaintiff got upon his engine, adjusted the coal chute, and while coal was being emptied into the tender thereof, and while he was in an obviously dangerous position, in the event these engines should be started or moved (all of which facts the other experienced servants of the defendant knew, or in the exercise of ordinary care would have known), the said engines were started and moved without notice or warning to the plaintiff, thereby causing the injury complained of.

The gist or gravamen of plaintiff's cause of action was the negligent starting of these engines while plaintiff was in a dangerous and exposed position coaling his engine.

Defendant asserts (Petition, p. 29):

> "It is uncontradicted that neither the coal chute man nor the man who started the engines at the time in question saw or could have seen the plaintiff."

While coaling his engine, the plaintiff was in the direct line of vision of the operating engineer (Rec., 100).

Plaintiff was also seen at work coaling his engine by the engineer in charge of the most northerly engine prior to and at the time of the starting of the engines (Rec., 112).

In our statement of the facts we have shown that McManaman, defendant's foreman, saw the plaintiff on his engine taking coal prior to and at the time the engines were set in motion (Rec., 60).

The engine watcher, Terasky, testified, on the second trial, that he saw a man on top of his engine prior to the movement in question but didn't know it was the plaintiff (Rec., 130).

Defendant contends (Petition, p. 7) that the failure to ring the bell on the engine before the train of engines was started or set in motion, could have no significance because plaintiff testified that he heard no bell

> " * * * before the starting of any other of the many movements, back and forth, and from chute to chute, prior to the movement in question, and that he had not paid, and was not paying, any attention to signals of any kind, by bell or otherwise."

It will be observed that there was but one movement of the engines southward after they were first spotted at the coal chute—prior to the movement that injured the plaintiff (Rec., 22, 40).

While plaintiff testified that he heard no signal preceding this one movement southward, such movement was not made while the coal chute was down and while coal was being emptied into the tender of an engine, but was made only after the coaling operation was completed and the coal chute adjusted.

But one witness testified for the defendant that the engine bell was rung (Rec., 102). The manifest weight of the evidence is to the effect that the bell was not rung.

We submit that the plaintiff, at the time of his injury, in view of the instructions given him at Waukegan, was at a place where he had a perfect right to be, in the due course of his employment. Having been ordered up on his engine to take water and having been interrupted and ordered, while so doing, to throw the spout aside before this task was completed—i. e., before the tank on his engine was filled, it was reasonable for him to assume, in the absence of any instructions to the contrary, that when the engines started back toward the water tank, after having been placed on a side track to let a through train pass, that his engine would again be stopped at the water tank where the unfinished task of taking water could be resumed.

When the engines did not stop there, but instead took the cross-over and stopped at the coal chutes, it was only natural for the plaintiff, in the light of the general order given him at Waukegan and the subsequent order at Beach to put water in his engine, to assume and believe it to be his duty to adjust the coal chute and coal his engine.

Defendant had both actual and constructive notice that plaintiff was in a place of danger at the time these engines were started, and defendant's negligence in the circumstances, is apparent.

Assumed Risk.

Plaintiff did not assume the risk of the negligent act or acts of defendant's employees suddenly and unexpectedly arising, and the doctrine of assumed risk is inapplicable to the facts in the present case.

Obviously, an employee does not assume the risk of the negligence of his employer or of his fellow employees unless he has knowledge of the negligence and the dangers arising therefrom or unless they are so plainly observable that he must be presumed in law to know of them. There is no evidence in the case which would support defendant's contention that the doctrine of assumed risk is at all applicable.

Instructions.

There was no error in giving or refusing instructions in this case. Defendant's instructions, as a series, embraced every possible theory of defense, viz., interstate commerce, scope of employment, actionable negligence on the part of defendant, and contributory negligence on the part of plaintiff.

The rules of law announced in many of these instructions were repeated over and over again and a number of them are more favorable to defendant than the law required.

All of defendant's refused instructions were fully covered by its given instructions or were misleading and argumentative and gave undue prominence to isolated items of the evidence. This type of instruction has been uniformly condemned by the courts.

Many of defendant's refused instructions attempt to split up the negligence charged in plaintiff's declaration and direct the jury on the evidence thus singled out to render a verdict in its favor. Many of these instructions peremptorily directed a verdict for defendant and could not be given if the case were to be submitted to the jury for determination.

In other words, the defendant, by these instructions, attempted to do what this Court said, in the case of *Union Pacific Railroad Company v. Hadley*, 246 U. S. 330, it might not properly do if the Court was of the opinion that in leaving the general question to the jury "the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of negligence."

Alleged Improper Argument.

On page 6 of their petition, in discussing the propriety of submitting to the jury the question whether or not plaintiff was employed in interstate commerce, counsel state:

> "In the Appellate Court's opinion no mention is made of the line of authorities actually applicable although they were submitted to that Court in your petitioner's brief."

In view of the repeated *reference* by *defendant's counsel* to the alleged misstatements of plaintiff's counsel during the argument to the jury and of the *reference* by defendant's counsel in their petition to matters claimed to have been set forth in their brief in the Appellate Court of Illinois, we feel justified in *referring* to the plaintiffs' briefs in both the Appellate and Supreme Courts of Illinois, wherein we directed the *court's attention* to the fact that, as appears *from* the complete record, p. 471, counsel *for defendant* also erred in his recollection *of the* testimany and vigorously asserted before the jury that plaintiff's counsel misstated the testimony of defendant's witness, Terasky.

Immediately preceding the opening argument to the jury, plaintiff introduced in rebuttal, by way of impeachment, the testimony of Terasky as given on the former trial of the case in February, 1926, to the effect that at the time plaintiff was injured Terasky saw a man on top of plaintiff's engine, but did not know whether it was the plaintiff (Rec., 160).

Defendant's counsel was not only mistaken in his recollection as to the testimony of Terasky on that trial as shown by the record, but he accused plaintiff's counsel of misstating the evidence. When it was demonstrated that he was in error, his explanation (Complete Record, 472) was: "twice the Court said you did not say it right—two times out of three—you were right once."

Furthermore, counsel for defendant argued to the jury that the ringing of the bell or the failure to ring it did "not cut any figure in the case." In other words, counsel stated "if the bell had been rung, what could he (the plaintiff) have done to save himself?" (Complete Record, 508).

There is nothing in the record to suggest that the verdict was obtained by appeals to passion or prejudice and we therefore submit that the errors assigned on the alleged improper argument of counsel for the plaintiff and the alleged excessiveness of the damages, having been settled adversely to defendant's contention by the decisions rendered by the Appellate and Supreme Courts of Illinois, do not present questions for re-examination in this Court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The duties of plaintiff's general employment, viz., the heating of defendant's depot and the various instrumentalities of interstate commerce, including coaches used in its interstate trains and interstate suburban coaches used in transporting interstate passengers (Rec. 71-72), were intimately and directly associated with the work of interstate commerce.

The trip to Bench for coal was incidental to plaintiff's general employment and was therefore also employment in interstate commerce.

Louisville & Nashville Ry. Co. v. Parker, 242 U. S. 13.
Southern Ry. v. Puckett, 244 U. S. 571.
Philadelphia B. & W. R. Co. v. Smith, 250 U. S. 101.
Erie R. Co. v. Collins, 253 U. S. 77.
Erie R. Co. v. Szary, 253 U. S. 86.
Hiser v. Davis, Director General of Railroads, 234 N. Y. 300.
Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353.
Davis v. Dowling, 284 Fed. 670.
N. Y. Cent. Ry. Co. v. Winfield, 244 U. S. 147.
Oliver v. Northern P. R. Co., 196 Fed. 432.
N. Y. Central R. R. Co. v. Carr, 238 U. S. 260.
Breske v. Minneapolis & St. L. Ry. Co., 115 Minn. 386 (132 N. W. 337).
Philadelphia B. & W. R. Co. v. McConnell, 228 Fed. 263-265.

Boyle v. Pa. R. R. Co., 228 Fed. 266.
Guida v. Penn. R. R. Co., 183 App. Div. (N. Y.) [illegible]; affirmed 224 N. Y. 712.

II.

The operation of the train of engines from Waukegan to Beach was a necessary preparatory movement in aid and furtherance of interstate commerce.

(a) The movement of the three engines to which plaintiff's engine was attached from Waukegan to Beach for the purpose of supplying them with coal for use in interstate commerce, establishes as a matter of law the interstate status of these engines and the men in charge of them.

(b) The unitary character of the movement of the four engines and the direct participation therein by the plaintiff, places him also as a matter of law within the same classification.

(c) The presence of the plaintiff or some other person on his engine was necessary to the movement of these engines from Waukegan to Beach and return, and the duties which plaintiff performed thereon were essential to the proper movement of said train of engines and to the safety of defendant's other employees and its property.

(d) He had certain, definite duties to perform, viz.: to keep the fire going in his engine and to see that the proper amount of water was maintained in the boiler.

(e) His work was essentially the same as that performed by the train employees in charge of these engines and subjected him to all the risks and hazards incidental to such service while this train of engines was being operated between Waukegan and Beach over defendant's main line.

(f) Plaintiff's engine was "a live" engine and would have been used in propelling these four engines on the next movement to be made at the coal chutes if plaintiff had not been injured (Rec. 108).

VII.

Under the undisputed evidence in this case, the work respondent was engaged in at the time of his injury brought him within the purview of the Federal Employers' Liability Act as a matter of law.

The facts fully satisfy the test laid down in the *Shanks* case (239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436).

In any event if reasonable minds could draw different inferences from the facts and circumstances in evidence as to whether respondent was so engaged, the question was properly submitted to the jury.

Southern Ry. Co. v. Lloyd, 239 U. S. 496.
N. Car. R. Co. v. Zachary, 232 U. S. 248.
Balt. & O. Ry. Co. v. Whitacre, 124 Md. 411.
N. Y. C. R. Co. v. Carr, 238 U. S. 260.
Balt. & O. R. Co. v. Kast (Cir. Court of Appeals, 6th Dist. June 6, 1924), 299 Fed. 419.
Mappin, Admx. v. A. T. & S. F. Ry. Co., 198 Cal. 733; 247 Pac. 911.
Erie R. R. Co. v. Van Buskirk (C. C. A. 3rd), 1 Fed. 2d, 70.
Dickinson v. Industrial Board, 280 Ill. 342, 344.
Erie R. R. Co. v. Welsh, 242 U. S. 303.
Roberts on *Federal Liability of Carriers*, Vol. 1, Secs. 461, 486, 487.
Boyle v. Pa. R. R. Co., 228 Fed. 266 (Circuit Court of Appeals, Third Circuit).
Brown v. Ill. Terminal Co., 319 Ill. 326, 331.
Davis v. Chicago R. I. & P. Ry. Co., 134 Minn. 49; 158 N. W. 911.

Penn. Co. v. *Donat*, 239 U. S. 50, 52.
Brock v. *Chicago, R. I. & P. R. Co.*, 305 Mo. 520 (Certiorari denied 266 U. S. 634).

In *Industrial Commission* v. *Davis*, 259 U. S. 182, wherein certiorari to the District Court of Appeals of the State of California was allowed, in holding that a precise ruling as to when a railroad employee is engaged in interstate or intrastate commerce, had not been attempted to be laid down and that it was not tangible to the perception of the Court how this could be done, this Court said, p. 188:

> "Further discussion is unnecessary though we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take estimation from degrees and of this, life and law are replete with examples."

In the case of *Southern Railway Co.* v. *Lloyd*, 166 N. C. 27; 81 S. E. 1004, although there was no dispute as to the facts bearing upon the character of the plaintiff's employment, the trial court submitted to the jury the question whether or not the plaintiff was employed in interstate commerce. It was contended in this court, 239 U. S. 496, that the trial court should have given the instruction requested by the defendant to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce. In affirming the judgment of the trial court, this court said, at page 501:

> "In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect. *North Carolina R. R.* v. *Zachary, supra; Pederson* v. *Del. Lack. & Western R. R.*, 229 U. S. 146; *New York Central R. R.* v. *Carr*, 238 U. S. 260; *Pennsylvania Co.* v. *Donat*, decided by this Court November 1, 1915, ante, p. 50."

Whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce in the case at bar, turned upon no interpretation of the act of congress but involved simply "an appreciation of the testimony" and the legitimate inferences deducible therefrom.

Erie Railroad Co. v. Welsh, 242 U. S. 303.

In the absence of clear and palpable error, this Court will not disturb the concurrent findings of state, trial and Appellate Courts in cases arising under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169.
Patton v. Texas & Pac. Ry. Co., 179 U. S. 658.
Supreme Lodge K. of P. v. Beck, 181 U. S. 49, 50.
Erie Railroad Co. v. Welsh, 242 U. S. 303.

IV.

This Court has not recognized the distinction between "commerce" and "transportation" that the defendant is seeking to make in this case.

In the case of *Erie R. R. Co. v. Collins*, 253 U. S. 77, this Court, in passing upon the character of the plaintiff's employment in that case, said, page 85:

> "In the *Pederson* case it was said that the questions which naturally arise: 'Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?' *Or as said in Shanks v. Delaware, Lackawanna & Western R. R. Co., supra, was the 'work so closely related to it (interstate commerce) as to be practically a part of it?' The answer must be in the affirmative.*"

Obviously, in announcing the test so frequently quoted by the defendant, as laid down in the *Shanks* case (*supra*), 239

U. S. 556, this Court did not intend that it should be given the limited or narrow construction contended by the defendant, otherwise this Court would not have expressed the views or reached the conclusions that it did in the cases of *Erie R. Co. v. Collins*, 253 U. S. 77; *Erie R. Co. v. Szary*, 253 U. S. 86, and *Philadelphia B. & W. R. Co. v. Smith*, 250 U. S. 101, or in the great majority of cases where the employment was held to have been in interstate commerce.

V.

Defendant was guilty of negligence, as interpreted and applied both by the Federal courts and the courts of Illinois.

Defendant's conduct in directing plaintiff—a green, inexperienced employee—to get on his engine and go to Beach for coal and water, without further instructions relative to his duties or as to the manner or method used by defendant in coaling its engines, and in permitting these engines to start forward, after defendant's foreman had observed plaintiff on top of his engine taking coal, in time to have prevented such movement, was clearly negligent and the direct proximate cause of plaintiff's injury.

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 192.
Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 69.
Devine v. Delano, 272 Ill. 166, 179-180.
N. Y. Cent. R. Co. v. Gapinski, 249 Fed. 346.
Ill. Cent. R. R. v. Siler, 229 Ill. 390, 393.
Hurst, Admx. v. Madison Coal Corp., 201 Ill. App. 205, 207.
Ford v. Hine Bros. Co., 237 Ill. 463, 467-468.
Union Pacific R. R. Co v. Hadley, 246 U. S. 330, 332, 333.

It was the primary duty of the defendant to instruct the plaintiff as to the line of his duty and to warn him of the dangers and hazards connected therewith.

18 Ruling Case Law, p. 567.

Pressed Brick Co. v. Reinneiger, 140 Ill. 334, 338.

White v. Nutriline Milling Co., 133 La. 370; 63 So. 385.

Eldridge v. Citizen's Ry. Co., 169 S. W. 375.

Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and this is true whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.

Richmond & Danville Rd. v. Powers, 149 U. S. 43, 45.

Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593, 606.

VI.

Plaintiff did not assume the risk of the negligent act or acts of defendant's employees suddenly and unexpectedly arising, and the doctrine of assumed risk is inapplicable to the facts in the present case.

Gila Valley, etc. Ry. v. Hall, 232 U. S. 94.

Seaboard Air Line v. Horton, 233 U. S. 492.

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 12.

Yazoo & Miss. R. R. v. Wright, 235 U. S. 376.

Erie R. R. Co. v. Purucker, 244 U. S. 320.

Grannon v. Donk Bros. Coal Co., 259 Ill. 350, 355.

Illinois Steel Co. v. Schymanowski, 162 Ill. 447.

Slack v. Harris, 200 Ill. 96.

Whether the danger was so obvious that an ordinarily prudent person in respondent's situation would have observed and appreciated it, was a question for the jury.

C. & O. v. DeAtley, 241 U. S. 310-315.

C. & O. v. Proffitt, 241 U. S. 462-468, and cases cited.

The settled rule is that it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer, or of those for whose conduct the employer is responsible.

Chesapeake & Ohio Ry. Co. v. DeAtley, 241 U. S. 310, 315.

Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1; 51 L. Ed. 681.

Great Northern R. Co. v. Knapp, 240 U. S. 464; 60 L. Ed. 745.

Under the Federal Employers' Liability Act, the burden of proving that the plaintiff assumed the risk of injury or was guilty of contributory negligence is upon the defendant.

Seaboard Air Line Railway v. Moore, 228 U. S. 433.

Central Vermont Ry. Co. v. White, 238 U. S. 507.

Roberts on "Federal Liability of Carriers," Vol. 1, Secs. 426, 427.

Fisher v. C. R. I. & P. Ry. Co., 290 Ill. 49, 56.

Waiswila v. Illinois Central R. Co., 220 Ill. App. 113.

VII.

The trial court did not err in the giving or refusal of instructions.

Pedersen v. *Del. Lack. & West. R. R.*, 229 U. S. 146.
Erie R. R. Co. v. *Collins*, 253 U. S. 77.
Erie R. R. Co. v. *Szary*, 253 U. S. 86.
Philadelphia, B. & W. R. R. Co. v. *Smith*, 250 U. S. 101.
Devine v. *C. R. I. & P. Ry. Co.*, 266 Ill. 248, 254.
Kenna v. *C. H. & S. El. R. R. Co.*, 284 Ill. 301.

(a) Defendant's refused instructions are either covered by its given instructions or are argumentative and erroneously single out items of evidence favorable to it, without reference to other facts and circumstances favorable to the plaintiff.

(b) An instruction which singles out evidence favorable to one party and ignores the evidence most favorable to the other, is vicious, especially where it fails to state that the evidence singled out may be considered in connection with all of the other facts and circumstances in evidence, or to indicate that there is any countervailing evidence on the subject.

Jeger v. *Julius Kessler & Co.*, 218 Ill. App. 39.
Evans v. *George*, 80 Ill. 51.
Tanner v. *Clapp*, 139 Ill. App. 353.
Norton v. *Clark*, 253 Ill. 557, 569.
Craig v. *Miller*, 133 Ill. 300, 305.
Sullivan v. *Eddy*, 164 Ill. 391.

If the instructions taken as a whole present the law with substantial correctness, it is sufficient.

Day v. *Porter*, 161 Ill. 235.
W. & S. Co. v. *O'Rourke*, 172 Ill. 177.

T. M. & N. R. Co. v. *Haws*, 194 Ill. 92.
Cent. Ry. Co. v. *Bannister*, 195 Ill. 50.
C. C. Ry. Co. v. *Mead*, 206 Ill. 178.
City of Roodhouse v. *Christian*, 158 Ill. 137.

VIII.

Where two juries have returned similar verdicts and the trial judge has each time approved those verdicts, it is a rule of long standing that courts of review will be extremely reluctant to interfere with such verdicts.

Stanton v. *Chicago City Ry. Co.*, 205 Ill. App. 385.
Merrill v. *Merrill*, 215 Ill. App. 602.
Upthegrove v. *Chicago Great Western R. R. Co.*, 168 Ill. App. 89.
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O'Brien v. *Curran*, 189 Ill. App. 542.
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Joliet Ry. Co. v. *Ferguson*, 93 Ill. App. 467, 468.
Wood v. *Hildreth*, 73 Ill. 525, 526.
Nevins v. *Gourley*, 97 Ill. 365, 370.

IX.

The alleged procedural errors are not subject to review in this court.

In *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, the rule is announced that this court considers only assignments relating to matter of practice, pleading and evidence which involves a construction of the Federal statute. It is said, p. 509:

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and the various rulings of the trial court which involve no construction of the Employers' Liability Act which, therefore, cannot be considered on writ of error from a State Court. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 486."

This Court will not review non-Federal questions which do not in their essence involve the existence of the right to recover under the Federal statute.

Seaboard Air Line v. *Padgett*, 236 U. S. 668.

X.

The question of excessive damages is a matter to be dealt with by the State Courts, and does not present a question for re-examination in this court.

Southern Ry. v. *Bennett*, 233 U. S. 80-87.
Lincoln v. *Power*, 151 U. S. 436.
Herencia v. *Gusman*, 219 U. S. 44-45.
Louisiana Oil Refining Corporation v. *Reed et al.*, 38 Fed. (2d) 159-162.
Chicago, & E. I. Ry. Co. v. *Divine*, 39 Fed. (2d) 537-539.
St. Louis Ry. Co. v. *Craft*, 237 U. S. 648.

Respondent respectfully submits that the petition for certiorari should be denied.

Joseph D. Ryan,
Attorney for Respondent.

[illegible]

[illegible]

No. [illegible]

([illegible])

CHICAGO AND NORTH [illegible]
COMPANY

vs.

EUGENE [illegible]

BRIEF FOR EUGENE [illegible]

[illegible]

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IN THE

Supreme Court of the United States

October Term, A. D. 1931.

No. 60.

(Docket No. 917.)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

vs.

EUGENE BOLLE,
Respondent.

BRIEF FOR EUGENE BOLLE, RESPONDENT.

STATEMENT.

Petitioner's (defendant's) statement of the case takes a one-sided or partial presentation of the evidence, emphasizing certain items of the evidence which tend to support its contentions and ignoring many important facts which tend to prove the essential elements of respondent's (plaintiff's) cause of action.

We have, in our answer to defendant's petition for certiorari, set forth the essential facts in controversy in this case, and we therefore deem it unnecessary to repeat them in detail here. We desire, however, to call attention to some of the more glaring omissions in defendant's statement in order that this Court may, in conjunction with defendant's statement, without reference to our previous statement, be fully apprised of our theory of the case and the facts which tend to support it.

In its statement of the facts, in referring to the buildings and instrumentalities which were heated by the stationary boiler, or the locomotive engine used in its stead when the former was out of commission, counsel assert that "sometimes suburban coaches" were heated, without making the slightest reference to the important evidence that these coaches were customarily taken out of interstate train number 151 originating in Chicago and destined to Milwaukee, Wisconsin, and were heated in the coach yard in Waukegan by this heating plant and were again, on the same day, customarily sent back to Chicago in an interstate train originating in Wisconsin (Rec., 53, 54).

Defendant's statement makes no mention of the fact that passengers coming from without the state on through trains, frequently disembarked at Waukegan, Illinois, and were then transported to intermediate stations at which the through trains did not stop, in suburban coaches which were heated by this plant (Rec., 54).

No mention is made of the fact that the employees of the bridge and building department of the defendant ate and slept in a bunk car that was heated by the heating plant in question (Rec., 52).

Nothing is said in defendant's statement about the fact that this heating plant supplied heat through underground pipes to a turntable situated just outside of the roundhouse for the purpose of keeping it from freezing in the wintertime and to prevent the formation of ice on the rails (Rec., 55). This turntable was used for turning classes of engines used in interstate and intrastate commerce (Rec., 55).

No mention is made in defendant's statement of the fact that the plaintiff, in the course of his regular employment, in addition to firing the stationary boiler or the locomotive engine, watched engines—meaning thereby that he supplied such engines with coal and water—or that he fired live engines and turned turntables (Rec., 18).

Defendant omits all reference in its opening statement to the general order given the plaintiff in Waukegan by Terasky, his immediate superior, in the presence of and at the behest of defendant's traveling engineer, which was as follows:

> "Gene, get up on your engine. We have to go to Beach to get coal and water" (Rec., 19).

Plaintiff was given [illegible] other instruction relative to the work he would be required to perform when the engines arrived at Beach. He had never been at Beach prior to the night of his injury (Rec., 19).

Defendant, in its statement of the case, makes no mention of the fact that plaintiff's engine was a "live" engine and would have been used in propelling these four engines on the next movement to be made at the coal chutes had plaintiff not been injured.

While this train of engines was en route from Waukegan to Beach plaintiff was required to fire his engine and to "look after the water" (Rec., 19).

Counsel assert (Brief, p. 4) "on the way, but before reaching the chutes, water was taken into one or two of the locomotives, plaintiff assisting in putting water into the heater engine * * *." This statement is well calculated to mislead the Court. The water tank from which water was taken was not "on the way" to Beach. It was situated alongside of defendant's main line at Beach (Rec. 15). When the train of engines arrived at Beach, Torask "hollered" at the plaintiff to get up on his engine and take water. (Torasky positively denied that he gave the plaintiff any such order (Rec. 67.)) Plaintiff accordingly got up on the tender of his engine, adjusted the water spout and commenced to take water in his engine (Rec. 15). It will be observed that plaintiff did this work himself and that he was not merely "assisting" in the work as counsel contend. While plaintiff was thus engaged, foreman McManaman signalled the engineer to move the engines on to a siding to let a train pass. Thereupon the engineer blew two blasts of the whistle that he was about to move the engines. Plaintiff, because of his inexperience, failed to understand or appreciate the signals and continued with his work until he was peremptorily ordered by McManaman to throw the waterspout aside, that they had to get in the clear to let a train pass. In response to this peremptory order the plaintiff stated to McManaman that he did not have enough water in his engine, but McManaman used language that he would not repeat in the presence of the lady court reporter and ordered him to throw it aside (Rec. 15). By the above that plaintiff's lack of experience was brought directly to the attention of defendant's foreman, McManaman.

Following the order given by McManaman to throw the spout aside, this train of engines got in the clear on a siding where they remained a few minutes, or until the train passed. They were then propelled northward toward the water tank and the plaintiff, believing the engines would again stop at the water tank, got up on his engine for the purpose of finishing the task he had begun. The engines, however, did not stop at the water tank but went on over the crossover to the northbound or east and then southward to the coal chutes (Rec., 20). Plaintiff's engine was the second engine from the south and the third from the north. When the engines pulled south and stopped at the coal chutes, plaintiff saw a man get up on the most southerly engine, pull down the coal chute and take coal in that engine. The train of engines then moved south again and this time the engine in charge of Tony Terasky, which was the second engine from the south and immediately next to plaintiff's engine, was spotted for coal. Plaintiff saw a man whom he believed to be Terasky, let down the coal chute and commence to take coal in his (Terasky's) engine and the tender of plaintiff's engine, following that second movement toward the south, being right opposite to a coal chute, he did likewise, i. e., jerked the chain, lowered the coal chute and started to take coal on his engine (Rec., 20).

It will be noted that the plaintiff testified that there was just one movement southward after the engines were spotted to take coal preceding the movement northward that resulted in his injury (Rec., 20). The coal chute man also testified that it was on this movement northward the plaintiff was injured (Rec., 88-89). Notwithstanding this testimony, defendant's counsel assert (Brief, p. 4) that at no time prior to the accident were any signals given "although many backward and forward movements were made" while the engines were being coaled. It will be noted also that this one movement southward was made by the most southerly engine, which was two engines removed from the plaintiff, and was not made until the process of coaling the most southerly engine had been completed and the coal chute adjusted.

Defendant makes no reference to the fact that plaintiff interpreted the general order given him at [illegible] to get on the engine to go to [illegible] for coal and water to mean that he (the plaintiff) was required to coal and water his engine upon its arrival at Beach (Rec., 21). Counsel say (Brief, p. 4) that plaintiff's explanation as to why he got up on his engine was that he thought they were to take more water in his engine but that "he knew that he could not take water into the engine from that place." While plaintiff testified that his primary purpose in getting on the tender of his engine at the place indicated as the engines started back toward the water tank was to take water, he also stated that when the engines proceeded over onto the southbound or east track that he was up there "at that time for the purpose of taking coal" because, as he stated, "I thought it was my duty to take coal" (Rec., 29).

Counsel further say (Brief, p. 5) that "all of the movements approaching and at the chutes were made on the loud oral instructions of the 'coal chute man.'" Counsel bases this latter assertion on the testimony of its engineer, Fleming, given on a former trial, but which he repudiated on the present trial. As a matter of fact, the coal chute man testified that when giving the orders to move from one chute to another, he was on the tender of the engine "right there where the engineer could hear me" (Rec., [illegible]).

There was no evidence given by anyone on this trial that the order given by Costopolis to move the engines from one chute to another could be heard by the plaintiff from his position on the second engine from the north. The wind was "blowing hard from the north" (Rec., [illegible]). Furthermore, at the time the movement was made northward that injured the plaintiff, the coal chute was down and coal was being emptied into the tender of plaintiff's engine, which operation made considerable noise (Rec., [illegible], 47), and, of course, would prevent the plaintiff from hearing the "loud oral instructions of the 'coal [illegible] man' '' even if there was evidence to support the contention (which we deny) that such order had been given in a loud tone of voice. Moreover, the operating engineer, Kucera, testified that the coal chute man was in the cab of the engine at the time he gave the direction to move (Rec., 73-74).

Counsel for defendant (Brief, p. 6) further say:

> "Neither the coal chute man nor the operator of the engines at the time in question could see Bolle from their positions. This is clear and uncontradicted."

The only testimony which supports counsel's contention that neither the coal chute man nor the operator of the engines could see Bolle from their positions is that given by these two witnesses themselves. The physical facts demonstrate that the operating engineer could have seen the plaintiff had he looked in the direction toward which he moved the engines. This engineer, when making the movement in question, was on the adjoining engine south of the one which plaintiff was in charge of and was looking through his cab window toward the north while the plaintiff was in his direct line of vision. There was no obstruction of any kind to prevent his seeing him (Rec., 75). Plaintiff was six feet tall and the place where he was standing on the tender of his engine was about a foot and a half lower than the cab of his engine (Rec., 21). While standing there the plaintiff could see the foreman and his helper on the west track close to the pilot of his engine (Rec., 21). The helper (St. Martin) was not called as a witness by the defendant, but the foreman, McManaman, testified that he saw the plaintiff taking coal on his engine prior to the movement in question.

Terasky testified that he was on the fireman's side of the engine which Kucera was operating, the second engine from the south at the time plaintiff was injured (Rec., 69). On the instant trial he testified positively that he did not see the plaintiff or anyone else at any time on the tender of plaintiff's engine taking coal (Rec., 67-68). On the second trial of the case in February, 1922, this witness was asked:

> "At the time Balle got hurt, did you then know he was up on top of his engine?"

He answered:

> "I didn't know if it was him or not. I knew it was somebody" (Rec., 93).

If Terasky could see the plaintiff, or could see a man on top of plaintiff's engine from the fireman's side of the operating engine, which was on the opposite side of the engine from the coal chutes, it is quite obvious that the engineer from his position on the right-hand side of the engine, or the side next to the coal chutes, could not have failed to observe the plaintiff who was in his direct line of vision had he paid the slightest heed to his surroundings or to the obvious danger necessarily incident to the movement of this train of engines while plaintiff's engine was being coaled.

The record in this case further discloses that on the first trial defendant's engineer, Fleming, testified that he was seated in the cab of the most northerly engine and was looking toward the south out of his cab window; that he saw the coal chute man on the most southerly engine (Rec., 35) while standing on the seat of the tender in the same place Balle was standing on his engine; that he also saw this man on the second engine from the south, but that he did not at any time see Balle who was standing on the engine immediately south of him, and but the length of two tenders from the place where he sat in his engine, and directly in his line of vision as he looked "rather intently" in that direction (Rec., 97).

On the second trial of this case, this witness testified that he saw a man on the tender of plaintiff's engine about ten seconds before he heard his outcry (Rec., 99). On the present trial he testified that he did not see anyone on Bello's engine prior to the accident (Rec., 51).

The plaintiff (Rec., 20-21), McManaman (Rec., 41) and Costopolis, the coal chute man (Rec., 99) all testified that the engines were moved northward while plaintiff was engaged in coaling his engine and that they were stopped in response to his outcry.

Kucera testified not only that he did not see the plaintiff prior to or during the movement in question but that he did not hear the plaintiff's outcry until after the engines had been stopped and the coaling of the second engine from the south had been completed (Rec., 71, 16-17).

We call attention to the evidence on this subject because of the assertion made in counsel's statement that the evidence was "clear and uncontradicted" that plaintiff could not be seen by the coal chute man nor the operator of the engine at the time of or prior to the movement which caused his injury.

SUMMARY OF ARGUMENT.

I.

The duties of plaintiff's general employment, viz., the heating of defendant's depot and the various instrumentalities of interstate commerce, including coaches used in its interstate trains and intrastate suburban coaches used in transporting interstate passengers (Rec., 53-55), were intimately and immediately connected with the work of interstate commerce.

(a) The trip to Beach for coal was incidental to plaintiff's general employment and was therefore also employment in interstate commerce.

(b) This Court has not recognized the distinction between "commerce" and "transportation" that the defendant is seeking to make in this case.

II.

The operation of the train of engines from Waukegan to Beach was a necessary preparatory movement in aid and furtherance of interstate commerce.

(a) The movement of the three engines to which plaintiff's engine was attached from Waukegan to Beach for the purpose of supplying them with coal for use in interstate commerce, establishes as a matter of law the interstate status of these engines and the men in charge of them.

(b) The unitary character of the movement of the four engines and the direct participation therein by the plaintiff, places him also as a matter of law within the same classification.

(c) The presence of the plaintiff or some other person on his engine was necessary to the movement of these engines from Waukegan to Beach and return, and the duties which plaintiff performed thereon were essential to the proper movement of said train of engines and to the safety of defendant's other employees and its property.

(d) He had certain, definite duties to perform, viz., to keep the fire going in his engine and to see that the proper amount of water was maintained in the boiler.

(e) His work was essentially the same as that performed by the train employees in charge of these engines and subjected him to all the risks and hazards incidental to such service while this train of engines was being operated between Waukegan and Beach over defendant's main line.

(f) Plaintiff's engine was "a live" engine and would have been used in propelling these four engines on the next movement to be made at the coal chutes if plaintiff had not been injured (Rec., 77).

III.

Under the undisputed evidence in this case, the work plaintiff was engaged in at the time of his injury brought him within the purview of the *Federal Employers' Liability Act* as a matter of law.

The facts fully satisfy the test laid down in the *Shanks* case (239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436).

In any event if reasonable minds could draw different inferences from the facts and circumstances in evidence as to whether respondent was so engaged, the question was properly submitted to the jury.

(a) Whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce in the case at bar, turned upon no interpretation of the act of Congress but involved simply "an appreciatio of the testimony" and the legitimate inferences deducib therefrom.

(b) In the absence of clear and palpable error, thi court will not disturb the concurrent findings of state, tri and appellate courts in cases arising under the Feder Employers' Liability Act.

IV.

Defendant's contention that a verdict should have been directed in this case, raises the naked legal questio whether there is any evidence in the whole record, whic from its reasonable intendments and inferences fairl tended to make out plaintiff's case.

(a) In passing on a motion to direct a verdict, thi court will look to the evidence supporting the claim of th party against whom the motion is directed in the light mos favorable to him without considering contradictory evidence or weighing the evidence.

(b) The plaintiff is entitled to have his case submitte to the jury, unless the conclusion follows, as a matter o law, that no recovery can be had upon any view whic could be properly taken of the facts that the evidence tends to establish.

V.

Defendant was guilty of negligence, as interpreted and applied both by the federal courts and the courts of Illinois.

Defendant's conduct in directing plaintiff—a gree inexperienced employee—to get on his engine and go t Ranch for coal and water, without further instructions rel tive to his duties or as to the manner or method used defendant in coaling its engines, and in permitting these engines to start forward, after defendant's foreman had observed plaintiff on top of his engine taking coal, in time to have prevented such movement, was clearly negligent and the direct proximate cause of plaintiff's injury.

(a) Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact; and this is true whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.

(b) It was the primary duty of the defendant to instruct the plaintiff as to his duties in the new and unfamiliar task to which he was assigned. Its failure to do so, in the light of the general order given him, viz., to go to Beach "to get coal and water," which was reasonably susceptible of the interpretation placed upon it by the plaintiff, was a proximate cause of the accident and injury complained of in this case.

(c) Under a dominant rule of local law the work of coaling the defendant's engines could not be delegated to an independent contractor so as to relieve the defendant from liability for the negligent acts of such contractor.

VI.

The plaintiff was acting within the scope of his employment at the time he was injured and was not a mere volunteer.

Plaintiff was doing what he believed he had been instructed and was expected to do and it was a question of fact for the jury to determine whether the defendant ought to have anticipated that he would so understand his instructions.

VII.

Plaintiff did not assume the risk of the negligent act or acts of defendant's employees suddenly and unexpectedly arising, and the doctrine of assumed risk is inapplicable to the facts in the present case.

Whether the danger was so obvious that an ordinarily prudent person in plaintiff's situation would have observed and appreciated it, was a question for the jury.

VIII.

The trial court did not err in the giving or refusal of instructions.

Defendant's given instructions embrace every possible theory of defense and its refused instructions are either covered by its given instructions or are argumentative and erroneously single out items of evidence favorable to it, without reference to other facts and circumstances favorable to the plaintiff.

IX.

The defendant was not prejudiced by the alleged present trial errors and they are not subject to review in this Court.

(a) This Court will not review non-federal questions which do not in their essence involve the existence of the right to recover under the federal statute.

(b) If this Court should take cognizance of the alleged errors, nevertheless the defendant was not prejudiced by the inaccurate statement made by counsel for the plaintiff in his argument to the jury, since the inaccuracy had to do solely with but one item of evidence and was referred to the charge of negligence contained in that one count of the declaration.

2.

The question of excessive damages is a matter to be dealt with by the state courts, and does not present a question for re-examination in this Court.

ARGUMENT.

1.

Plaintiff, at the time of his injury, was engaged in interstate commerce.

MAY IT PLEASE THE COURT:

Plaintiff in his general employment was operating a heating plant which supplied heat continuously to defendant's passenger depot, baggage room, coach yard pipes, roundhouse foreman's office, engineers' and firemen's register room, engineers' and firemen's bunk car, bridge and building bunk car, carpenter's shop, oil house and turntable (Rec., 51, 55).

The pipes in the coach yard were used to supply heat for all coaches that needed heating in the wintertime (Rec., 52). Coaches taken out of interstate trains en route from Chicago to Wisconsin were heated by this plant and were again, the same day, cut in to trains originating in the State of Wisconsin en route to Chicago (Rec., 54).

The bridge and building carpenters slept, ate and lived in the bridge and building bunk car. These men repaired bridges, fences, sidewalks, water tanks, etc. The maintenance of way car was used for the purpose of maintaining the tracks, signalling devices, etc (Rec., 52).

In the regular course of his employment plaintiff turned turntables for engines used in both classes of commerce. He watched—meaning thereby that he fired and watered—live engines (Rec., 12).

If an employee receives injury on the carrier's premises while going to or returning from his work in commerce of both kinds, he may recover under the Federal Employers' Liability Act, notwithstanding that if injured while actually at work, the status of his employment, whether interstate or intrastate, would be determined by the work he was actually engaging in at the time of his injury. *Erie R. Co. v. Winfield*, 244 U. S. 170; 61 L. Ed. 1057; 37 Sup. Ct. 556.

Turning turntables for engines which have been assigned for use in interstate commerce or in both interstate and intrastate commerce and firing or preparing engines assigned for use in both classes of commerce has been definitely determined by this Court to be employment in interstate commerce. It therefore necessarily follows that, like the switchman in the *Winfield* case, if the plaintiff had sustained injury on the defendant's premises while going to or returning from his work, he would necessarily come within the purview of the Federal statute. His general employment being in both classes of commerce, his trip to Branch for coal, like the trip of the switchman to or from his employment, was incidental to his general employment and, therefore, we submit, constituted employment in interstate commerce.

Counsel for defendant assert (Brief, p. 13) that because of our contention "that this Court did not mean what it said in the *Winfield* case" they believed they were justified in submitting an extensive review of the case decided by this Court since its decision in Second Employers' Liability Cases, 223 U. S. 1, relative to the test of employment in interstate commerce, in order to show that this Court meant "literally" what it said in the *Shanks* case, and that the language, viz.: "so closely related to interstate commerce as to be practically a part of it" used in the *Pedersen, Smith, Szary,* and *Collins* cases was an "obvious misquotation" (Brief, p. 96). Having assumed without basis that this Court did not intend to use the words "interstate commerce" and that they are an "obvious misquotation" and having further erroneously assumed that we were claiming "that this Court could not have meant the test as it appears in the *Shanks* decision," counsel then make this extraordinary statement (Brief, p. 97):

> "However these statements (referring to our contention that the words interstate commerce and interstate transportation are used interchangeably) find no support in the decisions of this Court, other than in the probable inadvertent or clerical error in the misquotation in the *Collins* opinion's brackets."

We submit that this Court has not heretofore, in so far as we have been able to ascertain, suggested or even intimated that it did not mean what it said in the *Collins* case or that its opinion contained "inadvertent" or "clerical" errors, or an "obvious misquotation" as counsel for defendant so modestly assert.

On the contrary, this Court, in the recent case of *New York Central R. Co. v. Marcone,* 281 U. S. 345, in referring to the plaintiff who was a round house employee, said (p. 350):

> "His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act."

We have not at any time contended that this Court did not mean what it said in the *Shanks* case. We stated in our reply to defendant's petition for certiorari that this Court did not intend that the test announced in that case should be given the limited or narrow construction contended for by the defendant, otherwise this Court would not have expressed the views or reached the conclusions it did in the *Erie*, *Collins*, *Szary*, and *Smith* cases, or in the great majority of cases where the employment was held to have been in interstate commerce.

The distinction between "commerce" and "transportation" which counsel for defendant are attempting to make in this case has not been recognized by this Court, as evidenced by a number of cases decided since the decision in the *Shanks* case. A brief analysis of but one of these cases, viz., *Philadelphia B. & W. R. R. Co.* v. *Smith*, 250 U. S. 101, will demonstrate that this Court never intended that the act of Congress, involved in this case, should be given the limited or narrow construction contended for by defendant.

An analysis of the *Smith* case will further demonstrate that plaintiff at the time of his injury was well within the test announced in a number of decisions rendered by this Court and that defendant's contention that Bolle did not come within the test because he "moved nothing in commerce of any kind" and that his work had no relation to the "movement of anything" and that it had "no relation to motive power or its creation," (Defendant's Brief, p. 17), is clearly untenable.

In the *Smith* case it was contended by counsel for defendant—citing and relying on the case of *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473,—that Smith was not engaged in interstate commerce; that what he had been doing before and expected to do afterwards was of no consequence; that at the time of his injury and for some weeks prior thereto he had been working as a mess cook and camp cleaner or attendant for a gang of bridge carpenters who were quartered "*for their own convenience*" in a camp car belonging to defendant which was not being moved in interstate commerce; that the car had been standing on a side track for several weeks prior to the injury, and that Smith, at the moment of the injury, was engaged in cooking food which was the property of himself and the carpenters and that, therefore, he was not at the time engaged in interstate commerce. In commenting on these contentions of the defendant, this Court said, p. 105:

> "As thus stated, the relation of plaintiff's work to the interstate commerce of his employer, would seem to be rather remote. But upon a closer examination of the facts the contrary will appear."

This Court then cited the *Pedersen case*, 229 U. S. 146, to the effect that the work of repairing bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be practically a part of it, and following the observation that it was of course, evident that the work of the bridge carpenters, in the *Smith* case was so closely related to defendant's interstate commerce as to be a part of it, said:

> "The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with

> the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had."

It will be observed that the work Smith was engaged in and which was held by this Court to be so closely related to interstate commerce as to be practically a part of it, was almost identical with the services rendered by the plaintiff, Bolle, when engaged in the operation of the heating plant in question, or the locomotive used in its stead. Bolle was furnishing heat to the bridge and building bunk car and maintenance of way car for the comfort and accomodation of the men actually engaged in the service of the defendant in interstate commerce. He was forwarding their work by permitting them to eat their meals and sleep on the defendant's premises where they were available for service at all times.

As we have heretofore pointed out, this Court in the *Smith* case held that the bridge carpenters and repair men were engaged in interstate commerce as a matter of law, under the decision of the *Pederson* case, *supra*. It necessarily follows in the case at bar that defendant's maintenance of way men and bridge carpenters were also, as a matter of law, engaged in interstate commerce. Even if we omit from consideration the evidence showing that the heating plant in question heated passenger coaches which were used in carrying interstate passengers to intermediate stations between Waukegan and Chicago and also the evidence that the heating plant in question was used to heat the turntable which was itself an instrument of interstate commerce and to prevent the formation of ice on the rails (Rec., 78), we have sufficient evidence to bring the plaintiff within the test announced in the *Smith* case.

It is quite apparent from the opinion of this Court in the *Smith* case that Smith was held to be within the protection of the Federal Act in question because the work he was engaged in at the time of his injury had the necessary effect of forwarding the work of the maintenance of way men or bridge carpenters. The facts in the *Smith* case, we believe, cannot be distinguished in principle from the facts in the instant case. Inasmuch as this Court based its decision that Smith was engaged in interstate commerce because of the relation his work bore to the maintenance of way men, who were engaged in repairing bridges, the conclusion seems inevitable that the work Bolle was engaged in, viz., in supplying heat to the B. & B. and maintenance of way cars and other instrumentalities of interstate commerce, was so closely related to interstate commerce as to be practically a part of it.

Smith was forwarding the interstate transportation of the defendant by preparing the food and beds of the bridge carpenters. Bolle was forwarding the interstate business of the defendant by supplying heat, a necessary and essential service at that season of the year, to the same class of employes and to the same kind of instrumentalities—as well as to the turntable and passenger coaches—without which these instrumentalities could not be used.

We submit the *Smith* case is directly in point and is controlling authority for holding that plaintiff's general employment at the time of his injury, was in interstate commerce.

The principal cases relied on by the defendant, viz.: *Shanks*, 229 U. S. 556; *Yurkonis*, 238 U. S. 439; *Harrington*, 241 U. S. 177; *Cousins*, 241 U. S. 641; *Nash*, 242 U. S. 619; *Winters*, 242 U. S. 353; *Branson*, 242 U. S. 623, are easily and readily distinguishable from the instant case in that in none of those cases was the plaintiff engaged in the operation of an instrumentality of interstate commerce or in preparing it for use as such. A casual reading of these cases demonstrates that the employment of these respective plaintiffs was one or more steps removed from interstate commerce and, therefore, did not come within the test announced in the *Shanks* case.

The argument advanced by counsel for the defendant in the instant case is strikingly similar to, if not identical with that urged by counsel for petitioner in the case of *Erie R. R. Co. v. Szary*, 253 U. S. 86. It was contended there, as here, that there was no way in which the plaintiff could be held to be engaged in interstate commerce, unless the decisions in the *Harrington, Yurkonis* and *Shanks* cases were disregarded; that the act of cleaning the stove for the purpose of heating sand which was to be stored for use in engines engaging in both kinds of commerce, was at best work antecedent to putting engine materials in storage. This Court, however, followed the test announced in the *Collins* case, 253 U. S. 77, and "the test there deduced from prior decisions" and decided that Szary was employed in interstate commerce.

In view of counsel's contention that the present case "is indistinguishable on facts and law" from this Court's decision in the *Cousins* case, 241 U. S. 641, *supra*, we deem it necessary to call attention to the facts and authorities upon which this Court in that case based its decision.

Cousins was a laborer employed in defendant's yard in Paducah, Kentucky. He was injured while wheeling a barrow of coal to one of the car repair shops. The coal was intended for use in heating stoves in the shop where employees of defendant were engaged in repairing cars for use in both interstate and intrastate commerce. There was no evidence showing that Cousins had anything to do with the coal after it was delivered to the shop, or that he duties required him to perform any service directly in connection with defendant's interstate commerce. This case was decided by the Minnesota Supreme Court before the decisions were rendered by this Court in the *Yurkonis* and *Shanks* cases, *supra*.

The work of Cousins in delivering coal to a repair shop for use when needed is identical with the work performed by *Harrington*, 241 U. S. 177, in delivering coal to a coal shed for use when needed, and in each instance the work is one step removed from work "so closely related to interstate transporation (or commerce) as to be practically a part of it." The *Cousins* case was decided, *per curiam*, on the authority of the *Yurkonis* and *Shanks* cases, *supra*.

The work performed by Bolle, the plaintiff, was not at all similar to the work performed by *Yurkonis, Shanks, Cousins*, or *Harrington*. These plaintiffs did not turn turntables or fire engines assigned for use in all classes of commerce, nor did they operate a plant which heated divers instrumentalities of interstate commerce including coaches used in transporting interstate passengers, as did the plaintiff in the instant case.

In *Grussewsky v. Director General of Railroads*, 95 Conn. 119, 113 Atlantic Reporter 160, the defendant maintained near its tracks a heating plant which transmitted steam through pipes to cars on its tracks with which connection was made by steam plugs. The steam generated was used in both interstate and intrastate commerce. The employee did not make said connections but operated said heating plant and five or six times an hour brought coal to the boiler from cars on its tracks. He was held to have been employed in interstate commerce under the authority of *Erie R. R. Co. v. Collins*, 253 U. S. 77; *Erie R. R. Co. v. Szary*, 253 U. S. 86; *C. B. & Q. R. R. Co. v. Harrington*, [illegible] U. S. 177; *Roush v. Baltimore & O. R. Co.*, [illegible] Fe 712.

In the case of *Bruce v. Davis, Director General of Railroads*, [illegible] N. Y. [illegible], the defendant operated a ferry between New York and New Jersey. At its New York terminus was a building in which were boilers which heated the waiting room, restaurant and ticket office and furnished hot water for the ferry boats. The plaintiff's intestate was engaged with others in removing an old smokestack from the boiler building, to be replaced by a new one. While so engaged a ferry boat entered the slip without appropriate warning and he was caught between the apron and dock, and was so injured that he died. He was held to have been engaged in the work of interstate commerce at the time he was hurt. The court citing *Erie R. R. Co. v. Collins*, [illegible] U. S. 77; *Pedersen v. D. L. & W. R. R. Co.*, 229 U. S. 146; *Shanks v. D. L. & W. R. R. Co.*, 239 U. S. 556, and *Smith v. Erie R. R. Co.*, [illegible] N. Y. 712.

In *Grube v. Pennsylvania R. R. Co.*, 188 App. Div. [illegible], 176 N. Y. S. [illegible] (July, 1919), the Appellate Division of the Supreme Court of New York held that, where a railroad company maintained boilers at Long Island station, Long Island City, in the state of New York, in which it produced steam necessary to operate electricity producing machinery, from which it supplied power to both interstate and intrastate work, such boilers are indispensable to the carrying on of interstate commerce, and a workman [illegible] while [illegible] from one of the boilers was [illegible] in interstate commerce, within the meaning of the Federal Employers' Liability Act, and hence his remedy was under that act and he was not entitled to an award under the Workmen's Compensation Law of the State of New York (Consol. Laws, c. 67).

The case was carried to the New York Court of Appeals which affirmed without opinion, [illegible] N. Y. [illegible]; [illegible] N. E. [illegible].

See also: [illegible] v. N. Y. N. H. & H. R. R. Co., [illegible] N. Y. [illegible].

Counsel for defendant cite the case of Erie R. R. Co. v. Welsh, 242 U. S. 303, in support of their interpretation of the test announced in the Shanks case, and say that this court in affirming the decision of the state courts of Ohio that Welsh was not employed in interstate commerce cited the Shanks case "to the proposition that the question relates only to the work being done at the time of the injury."

This Court did not cite the Shanks case "to the proposition that the question relates only to the work being done at the time of the injury." On the contrary, this Court cited the case of New York Central and Hudson River R. R. Co. v. Carr, 238 U. S. 260, 263, as well as the Shanks case in support of its conclusion that the question whether Welsh was employed in interstate commerce could not be answered "by [illegible] to the words used [illegible] by the state Supreme Court, 89 Ohio State 81, that "he was not then and there employed in moving or handling cars engaged in interstate commerce"; that the question whether he was performing an act so directly and immediately connected with his previous work depended upon "whether the series of acts that he had just performed and purposed to perform were to be regarded as a succession of separate tasks or as a single and indivisible task"; that the question did not then require an interpretation of the act of Congress, but called "simply for an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce." [illegible]

> "The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that in the proper exercise of the jurisdiction of this Court in cases of this character, the decision ought not to be disturbed." *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 466.

The question whether the plaintiff was engaged in interstate commerce is not to be determined by the particular service being performed at the time of injury, isolatedly considered, or by his physical position at the moment of injury.

We respectfully call attention to what is said in the case of *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473.

> "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury isolatedly considered, was in interstate or intrastate commerce."

We also call attention to *New York Central R. R. Co. v. Carr*, 238 U. S. 260, wherein the Court, in commenting on the fact that during the same day railroad employes often and rapidly pass from one class of employment to another, said, p. 263:

> "But the matter is not to be decided by considering the physical position of the employe at the moment of injury."

II.

The operation of the train of engines from Waukegan to Beach was a necessary preparatory movement in aid and furtherance of interstate commerce.

While we submit that the foregoing reference to the facts and the decisions applicable thereto demonstrate that plaintiff's general employment was in interstate commerce or in commerce of both kinds and that, therefore, the trip to Beach for the purpose of supplying his engine with fuel was a necessary part or incident of his employment and interstate in character, we further respectfully urge that apart from his general employment and without reference thereto, the work in which the plaintiff was engaged at the time of his injury brought him within the purview of the Federal Act for the reason that it was inseparably connected with the work of preparing locomotives for use in interstate transportation.

As was said by this Court in the case of *Southern Ry. Co. v. Puckett*, 244 U. S. 571, at p. 573:

> "preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act."

It was stipulated by the defendant on the trial (Rec., 15-17) that the three engines, to which plaintiff's engine was coupled at the time of his injury, made the trip from the roundhouse to the coal chutes to be coaled for the purpose of thereafter engaging in both classes of commerce, and that prior to and at the time of the injury to Rolle, the defendant knew and had records to show that these engines had been definitely assigned for use in interstate transportation.

We submit that the movement of the three engines to which plaintiff's engine was attached from Waukegan to Beach, a distance of four miles over the main line of the defendant, for the purpose of supplying them with coal for use in interstate transportation, establishes as a matter of law the interstate status of these engines and the men in charge of them. The unitary character of the movement of the four engines and the direct participation therein by the plaintiff, places him also as a matter of law within the same classification and gives to his engine and the work in which he was engaged the quality of interstate commerce.

When the engine upon which the plaintiff was working was coupled up with these three engines and when he was assigned to a task having to do with the operation of them, he became a necessary and essential factor in that movement. In order to include plaintiff's engine in this movement, it was necessary to have someone in charge of it. Plaintiff was ordered by defendant's duly authorized agent, Terasky, in the presence of its traveling engineer, to accompany his engine on this trip and perform certain duties thereon (Rec., 19). It was just as essential and necessary to have someone in charge of plaintiff's engine as it was to have someone in charge of each of the other engines.

Plaintiff's engine was a "live" engine and would have been used in propelling these four engines on the next movement made at the coal chutes, had plaintiff not been injured (Rec., 77).

Plaintiff was directly participating in the operation of not only the engine under his charge but in the entire movement of this train of engines from Waukegan to Beach. When these engines moved, plaintiff moved. When they stopped, he stopped. The work in which he was gaging was so inseparably connected with the work in which the other employes were engaged that the entire movement became one inseparable, indivisible task.

The work in which the plaintiff and the other employes of the defendant were engaged on the occasion in question in the management and operation of this train of engines from Waukegan to Beach, and the work incident thereto at Beach, was so closely related that they were not only directly co-operating and assisting each other in the particular business in hand, but they were in a position to exercise an influence upon each other, promotive of proper caution, and their employment was such as to render them, while engaged in the work in question, fellow servants as a matter of law (*Aldrich* v. *I. C. R. R. Co.*, 241 Ill. 402, 406, 407).

III.

Where any question of facts exists or where reasonable minds could draw different inferences from circumstances shown without contradiction, the matter is for the jury.

In the case of *Southern Railway Company* v. *Lloyd*, 239 U. S. 496, where the facts were undisputed, this Court held that the question whether or not plaintiff was employed in interstate commerce required submission to a jury.

In that case a locomotive engine had been in the shop for repairs for some time and upon the completion of this work, the plaintiff, an engineer, was inspecting and operating it for the purpose of ascertaining whether it was in proper condition for its run from Spencer, North Carolina, to Monroe, Virginia. Plaintiff expected to take this engine out that day or the next on this trip.

On the trial of the cause, the court submitted to the jury for determination the question whether or not plaintiff was engaged in interstate commerce, and gave to the jury a special interrugatury, reading as follows:

> "Was the plaintiff, at the time of receiving such injury, engaged as an employe of the Southern Railway Company in interstate commerce?" 166 N. C. 27; 81 S. E. 1004.

The North Carolina Supreme Court overruled defendant's assignment of error, that the trial court should have directed a verdict in its favor because the plaintiff failed to prove he was engaged in interstate commerce (166 N. C. 35). In this Court (239 U. S. 496) the error assigned was that the trial court, at the defendant's request, should have held, as a matter of law, that plaintiff was not engaged in interstate commerce at the time of his injury. Concerning this assignment of error, this Court stated, at p. 501:

> "As to other questions of a Federal character, they may be briefly disposed of. It is insisted that the trial court should have given the instruction requested by the railroad company to the effect that, upon the facts shown, the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that, in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect. *North Carolina R. R. v. Zachary, supra; Pedersen v. Del. Lack. & West. R. R.*, 229 U. S. 146; *New York Central R. R. v. Carr*, 238 U. S. 260; *Pennsylvania Co. v. Donat*, decided by this court November 1, 1915, ante, p. 50."

In the case of *North Carolina R. Co. v. Zachary*, [illegible] U. S. 248; 34 Sup. Ct. 305, 309, the evidence concerning the character of the plaintiff's employment at the time of his injury was undisputed. In passing on the question of whether the plaintiff was employed in interstate commerce, the court said:

> "We conclude that, with respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider."

To the same effect are:

Pennsylvania R. R. Co. v. Donat, 239 U. S. 50.

Seaboard Air Line v. Padgett, 236 U. S. 668.

Mappin, Admx. etc. v. Atchison, Topeka & Santa Fe Ry. Co., 198 Cal. 733, 247 Pac. 911.

Erie R. v. Van Buskirk (C. C. A. 3d) 1 Fed. (2d) 70.

B. & O. R. Co. v. Darling (C. C. A. 6th) 2 Fed. (2d) 987.

Brock v. Chicago, R. I. & P. R. Co., 305 Mo. 502 (certiorari denied), 266 U. S. 634.

Schendel v. C. R. I. & P. Ry. Co., 158 Minn. 469 (reversed on other grounds) 270 U. S. 611.

Brown v. Illinois Terminal Co., 319 Ill. 326.

We submit that the *Lloyd* case and the cases cited therein definitely decide that, even where there is no conflict in the evidence, the question as to whether an employee is engaged in interstate commerce becomes a mixed question of law and fact and requires submission to a jury unless the court can say, as a matter of law, that there is no evidence proving or tending to prove that the plaintiff's work is so closely related to interstate commerce as to be practically a part of it.

In the case of *Ind. Com. v. Davis*, 259 U. S. 182, cited by counsel for defendant, this Court stated that it was impossible to lay down a rule or test that would automatically solve every case, and at page [illegible] said:

> "Further discussion is unnecessary though we are brought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take coloration from degrees and of this, life and law are replete with examples."

The above cases demonstrate that there is no hard and fast rule and no test by which it can be definitely determined in all instances whether employment is in intrastate or interstate commerce, and that where reasonable minds could draw different inferences or conclusions, from the undisputed facts, the question is properly submitted to a jury for determination.

Defendant contends that the decisions of the Appellate and Supreme Courts of Illinois in actions brought under the Federal Statute even where the facts are undisputed or even stipulated, make it the law that whether such facts bring the parties within the Federal Act is for the ultimate determination of the jury unless the evidence is such that "all reasonable minds must necessarily agree" that at the time of the accident, plaintiff's employment was not in interstate commerce even though this Court, on identical or similar facts, may have held that the act did not apply.

We submit that the decisions of the Illinois courts are not susceptible of any such interpretation as evidenced by a number of cases decided by these Courts since the decision in the instant case, holding as a matter of law that the question of interstate commerce under the facts of those cases was one of law for the court.

In the recent case of *Spencer v. C. & N. W. Ry. Co.*, [illegible] Ill. 560, at page 567, the Supreme Court of Illinois in reversing the Trial and Appellate Courts, held that its jurisdiction being the same as the jurisdiction of this Court (citing cases of this Court on the subject) it was its duty to review the evidence and determine as a matter of law whether Spencer came within the provisions of the Federal Act, and stated, p. 567:

> "Defendant in error (Spencer) was not engaged in interstate commerce at the time he was injured, the Federal Act did not apply, and the judgments of the circuit court and the Appellate Court will be reversed."

While the language of the Appellate Court of Illinois to the effect that "wherever an issue is made in a case and evidence must be introduced to maintain the issue, controverted questions of fact are involved which include not only evidentiary facts, but ultimate facts, even though there be no conflict in the testimony, or the evidence may be agreed upon or embodied in a stipulation of facts," might be given the construction that the question whether an employee is engaged in interstate commerce should in all cases be submitted to a jury for determination, we submit that an analysis of this decision as well as that of the Illinois Supreme Court will demonstrate that what the Courts meant and intended to say was that where reasonable minds could draw different inferences from the facts and circumstances shown without contradiction, it is the duty of the court to submit the matter to a jury for determination unless a rule of decision applicable to the undisputed facts as finally established has been laid down by this Court.

There is nothing in the opinions of the Illinois Courts which even suggests that they will not, upon review of any case, examine the evidence and determine, as a matter of law, whether there is any evidence sufficient to prove that the employment was in interstate commerce.

We respectfully urge, that regardless of the language used by the Courts of Illinois, this Court will examine the evidence in this and other cases brought under the Federal Act for the purpose of determining whether, when all the evidence is considered, together with all the reasonable intendments to be drawn therefrom in its aspect most favorable to the plaintiff, there is sufficient evidence to prove the plaintiff's employment was within the purview of the Federal Act.

We submit the evidence in this case is sufficient to warrant this Court in holding from a review of the evidence that Bolle, as a matter of law, was engaged in the work of interstate commerce at the time of his injury, or that in any event there was sufficient evidence of plaintiff's interstate employment to justify the submission of the question to a jury.

In support of its contention that the question whether or not Bolle was engaged in interstate commerce is one of law, counsel cite the case of *Illinois Central R. Co.* v. *Behrens*, 233 U. S. 473, 475. They argue that this question was decided favorably to their contention in that case, and point out that this Court there treated the question as one of law, pursuant to the request and certificate of facts of the Circuit Court of Appeals under Section 239 of the Judicial Code.

We submit that there is no conflict between the decision in the *Behrens* case and our contention that in the instant case the question was one of fact for the jury, as in the *Behrens* case this Court, in accordance with the request of the Circuit Court of Appeals, simply examined the evidence to determine as a matter of law whether there was any proof of the plaintiff's interstate employment.

IV.

The trial court properly overruled the motion of defendant for a directed verdict in its favor.

It is the well settled rule that the plaintiff is entitled to have the case submitted to the jury unless the conclusion follows as a matter of law that no recovery could be had upon any view which could be properly taken of the facts that the evidence tends to establish.

Dunlap v. Northeastern R. Co., 130 U. S. 649, 652.
Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593, 606.

The motion to direct a verdict for the defendant is in the nature of a demurrer to the evidence; and all inference arising from the evidence must be taken most strongly and favorably for the plaintiff.

McCune v. Reynolds, 288 Ill. 188, 190.

The most favorable evidence for the party against whom the motion is made must be accepted as true, and the most favorable interpretation which the evidence will bear must be given to the evidence.

Walldren Express Co. v. Krug, 291 Ill. 472, 475.
Yess v. Yess, 255 Ill. 414, 418.

It has been held that the question of assumed risk must be submitted to the jury unless the evidence that the plaintiff assumed the risk is so incontrovertible that reasonable minds would not differ about the conclusions that should be reached.

Chesapeake & Ohio Ry. v. De Atley, 241 U. S. 310, 315.

It is also stated that to justify a verdict for the defendant on the ground of assumption of risk, the evidence tending to show such assumption must be clear and uncontradicted.

Kanawha & Michigan Ry. Co. v. Kerse, 239 U. S. 576, 579, 581.

Chesapeake & Ohio Ry. Co. v. Winder, 23 Fed. (2nd series) [illegible], 795.

The settled rule also is that it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or the negligence of those for whose conduct the employer is responsible.

Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 315.

Gold Hunter Mining & Smelting Co. v. Johnson, [illegible] Fed. [illegible], [illegible].

V.

Defendant was guilty of negligence as interpreted and applied by the federal courts and the courts of Illinois.

It is undisputed that this train of engines was suddenly moved while plaintiff was on the tender of his engine engaged in coaling it and in an obviously dangerous position in the event these engines should be started or moved without warning.

Defendant's fireman, McManaman, saw the plaintiff on top of his engine taking coal and heard the coal chute man signal the engineer on the second engine from the [illegible] to move the engines north to the next chute (Rec. [illegible]). McManaman further testified that he saw a man, [illegible] was [illegible], on top of his engine [illegible] the coal chute man gave the direction to move the engines toward the north to the next chute; that he (McManaman) had time, after he discovered him there and after this order was given, to do something, but he did not do anything because he didn't think they would do anything (meaning, of course, thereby, that they would not start the engines) while that man was there.

It will thus be seen from the testimony of McManaman that there is no warrant or basis in the record for the assertion by defendant's counsel (Brief, p. 45) that "the interval of McManaman's supposedly negligent inaction was between the time of his 'discovery' and the giving of the order to move by the coal chute man which was immediately followed by the movement which injured plaintiff." It will also be noted in this connection that Terasky, plaintiff's immediate superior, testified on a former trial that he saw a man on top of Bolle's engine but that he didn't know it was Bolle (Rec., 98).

Defendant contends (Brief, p. 51) that "as to the charge of negligence for failure to ring a bell" before starting the movement of the engines, the record discloses no question for the jury; that plaintiff's testimony on the subject was without weight as "he neither heard nor saw any signals of any kind at any time."

It will be observed that there was but one movement of the engines after they were first spotted at the coal chutes prior to the movement that injured the plaintiff (Rec., 20, 39). While plaintiff testified that he heard no signal preceding this one movement, such movement was not made while the engine was being coaled and while the coal chute was down, but was made only after the coaling operation had been completed and the coal chute adjusted.

We submit the plaintiff had the right in the circumstances to assume that while the coal chute on his engine was down and while coal was being emptied into the tender of his engine and while he was standing in an obviously dangerous position in the event the engines should be started or moved, no such movement would be made until the process of coaling the engine had been completed and the coal chute adjusted.

There is but one count (2d) in plaintiff's declaration which charges negligence in failing to ring the bell on the engine, and this is based on the alleged violation of one of defendant's rules.

Other counts of plaintiff's declaration allege that the defendant ordered the plaintiff, a youthful, inexperienced employe, to perform a service for the defendant with which he was totally unfamiliar, without instructing him as to his duties or as to the manner or method adopted by defendant in supplying the engines in question with coal, and that it failed to efficiently supervise the work that was being carried on at Beach; that plaintiff got upon his engine, adjusted the coal chute, and while coal was being emptied into the tender thereof, and while he was, then and there, in an obviously dangerous position in the event these engines should be started or moved, all of which facts the other servants of the defendant knew, or could, in the exercise of ordinary care, have known, the said engines were started and moved without notice or warning to the plaintiff, thereby causing the injury complained of.

If, through failure of defendant to instruct plaintiff as to his duties, and through its failure to efficiently supervise the work that was being carried on at Beach, the plaintiff was led to believe that his duty required him to perform a service that was customarily performed by someone else, and of which custom the plaintiff was not informed, the defendant should not be permitted to say that the plaintiff was acting without the scope of his employment or that his own "voluntary" conduct was the cause of his accident.

It is also urged by defendant that the plaintiff, himself, did not interpret the general order given him at Beach as an order to actually put water in his engine, as he did not attempt to do so until he had been ordered up on his engine by Terasky.

The plaintiff, however, testified that when the engines came to a stop upon their arrival at Beach, he did not know that his engine was "at the water spout"; that he didn't know "why they were stopped" until he had been directed by Terasky to get on his engine and take water (Rec. 24). Plaintiff testified that he interpreted the order given him at Waukegan, viz., "Gene, get up on your engine, we have to go to Beach to get coal and water" to mean that it was part of his duty to supply his engine with coal and water (Rec., 21, 29) upon its arrival at Beach. The subsequent order, given him by Terasky upon the arrival of his engine at Beach, to get on his engine and take water, actually confirmed his conclusion and belief that it was his duty to do both.

Terasky denied positively that he ordered plaintiff up on his engine to take water. He testified that when he arrived at the waterspout he found Bolle up on top of his engine and that he at no time ordered him up there (Rec. 66). It will thus be seen that if Terasky's statement be accepted as true that he at no time ordered plaintiff up on his engine to take water, then counsel's argument, that in taking water plaintiff "didn't act on the original 'instruction'", must fail. We might add, in this connection, that this is one of the few instances in the whole record wherein counsel for defendant concede plaintiff was telling the truth.

We submit counsel cannot consistently urge that plaintiff did not interpret the general order given him at Waukegan to mean that he should actually take water in his engine, since its own witness, Terasky, if his testimony is to be believed, construed his own order as the plaintiff construed it. Otherwise Terasky would have ordered him down when he found him up on his engine.

Counsel argue that the testimony of plaintiff, that he expected a warning before the movement that hurt him was made, is without legal weight, as plaintiff did not observe the giving of any signals on the occasion of the other movements at the coal chute. In this connection, counsel overlook the undisputed evidence that defendant's foreman personally warned plaintiff when the engines were about to be moved while the plaintiff was standing upon the tender of his engine putting water therein.

When the train of engines was standing at the water spout and it was decided to clear the track to let a through train pass, the engineer sounded two blasts of the whistle as a signal to plaintiff to stop taking wafer as the engines were about to be moved (Rec. 43). Here again plaintiff's absolute ignorance of the railroad business and of the method of carrying on the work to which he was assigned, was demonstrated and brought forcibly to the attention of defendant's foreman.

[illegible] having no idea of the significance of the engineer's signal, continued to take water into his engine and it became necessary for defendant's foreman to walk back to [illegible]'s engine and personally direct him to throw the spout aside as they had to clear the track. Yet this same foreman, realizing the plaintiff's lack of experience in the work that was being performed that night, gave him no instructions or directions whatsoever as to the conduct of the work at the coal chutes.

The plaintiff was in the employ of the defendant for but a short space of time,—November 15th to December 4th—and during this time his duties did not take him beyond the roundhouse of the defendant in Waukegan. We contend it was clearly the duty of the defendant when it took him out of his regular employment and placed him in a new and different environment and with older and more experienced employes, who knew what they were to do and what was expected of them, to instruct him (the plaintiff) as to what his duties were in this new employment or in the event of its failure so to do, to have someone in charge and supervision of this particular work who would see that it was carried on with reasonable safety and with due regard for the safety of this inexperienced plaintiff. To hold otherwise would be to disregard the primary duty that a master owes to an inexperienced employe to instruct him and warn him of dangers not incidental to his regular employment.

The rule of law in this regard is laid down in 18 Ruling Case Law, page 567, as follows:

> "It is the duty of one who employs a youthful or inexperienced servant for a service attended with dangers which are known to the employer but unknown to the servant, to explain to him the perils incident to the employment and to instruct him how to avoid them."

In the case of *Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, the Court said, p. 338:

> "Employers owe it as a duty to such inexperienced servants to point out the dangers of which they themselves have or ought to have the knowledge and to give such warnings as may lead to the avoidance of injury by the exercise of reasonable care. More es-

> pecially should this duty be performed where the danger and the means of avoiding it are not apparent, or fully within the comprehension of the servant. 1 Shear. & Red. on Neg. (5th ed.), secs. 218, 219.
>
> Whether the plaintiff below was such a person as was entitled to demand of the defendant the performance of the duty here indicated, and whether the defendant actually discharged its duty towards him in this regard, were matters for the jury to determine from all the facts and circumstances of the case."

See also:

Eldridge v. *Citizens Ry. Co.*, 169 S. W. 375.
Runge v. *Helmbacker Forge & Rolling Mill Co.*, 161 Ill. App. 211.
McFarland v. *Edmunds Mfg. Co.*, 97 Ill. App. [illegible].
American B. S. & F. Co. v. *Tolussis*, 125 Ill. App. 622.
C. R. I. & P. Ry. Co. v. *Daugaard*, 118 Ill. App. 67.
P. C. C. & S. L. Ry. Co. v. *Hewitt*, 102 Ill. App. 428.
Pullman Palace Car Co. v. *Laack*, 143 Ill. 242.
Skulimowski v. *Deahl, et al.*, 169 Ill. App. 355.

Terasky seeing plaintiff up on the tender of his engine actually putting water in his engine, must have understood and recognized it to be plaintiff's duty to do so. Otherwise he was grossly negligent in not warning plaintiff that that work was out of the line of his duty. If the general order meant that Bolle should actually put water in his engine, then the conclusion inevitably and logically follows, in the absence of instructions to the contrary, that it was his duty to actually put coal in his engine. This conclusion was strengthened by the fact that both tasks were accomplished by a very similar operation.

Defendant's vice-principal, Terasky, knew the instructions he had given plaintiff when they started on that trip from Waukegan. He knew what interpretation plaintiff had placed upon it as to one of the two purposes assigned for making the trip. He recognised, and according to his own testimony, impliedly assented to that interpretation as the true and correct one. He was fully aware of plaintiff's lack of experience and of his total ignorance of defendant's method of coaling engines at Beach. Reason and common sense must have told him that plaintiff would naturally construe both parts of the general order alike.

Knowledge on the part of defendant's foreman who had charge of all of the men engaged in moving these engines that plaintiff's engine was being coaled and that a man was standing on the tender of it in an obviously dangerous position, in the event the engines should be started or moved, is knowledge on the part of the defendant, itself.

We submit that the plaintiff, at the time of his injury, in view of the instructions given him at Waukegan, was at a place where he had a perfect right to be, in the due course of his employment. Having been ordered up on his engine to take water and having been interrupted and ordered, while so doing, to throw the spout aside before this task was completed—i. e., before the tank on his engine was filled, it was reasonable for him to assume, in the absence of any instructions to the contrary, that when the engines started back toward the water tank, after having been placed on a side track to let a through train pass, that his engine would again be stopped at the water tank where the unfinished task of taking water could be resumed.

When the engines did not stop at the water tank, but instead took the cross-over and stopped at the coal chutes, it was only natural for the plaintiff, in the light of the general order given him at Waukegan and the subsequent ex-due at Beach to put water in his engine, to assume and believe it to be his duty to adjust the coal chute and coal his engine.

Defendant had both actual and constructive notice that plaintiff was in a place of danger at the time these engines were started, and defendant's negligence in the circumstances, is apparent.

In *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184, the trial court submitted the case to the jury to determine whether the defendant was guilty of negligence as charged by the plaintiff, which resulted in the death of her husband, Myers.

On appeal, the Circuit Court of Appeals was of the opinion that upon the facts shown, the plaintiff had not made out the right to recover and the judgment was reversed without directing a new trial and without sending the case back. In the course of its opinion, in reversing the Court of Appeals, this Court at page 193, said:

> "Unless the testimony was such that no recovery could be had upon the facts shown in any view which could be properly taken of them, the verdict and judgment of the District Court must be affirmed.
>
> That there was ample testimony to carry the question of negligence to the jury, we have already said, and in any case, it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the *ways charged in the petition.*
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> * * *
>
> *In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict.*" (Italics ours.)

In *Illinois Central R. R. Co. v. Skaggs*, 240 U. S. 66 (Opinion, page 69), it is said:

> "The inquiry must be whether there is neglect on the part of the employing carrier and if the injury to the employee resulted 'in whole or in part' from

the negligence of any of its other employees, it is liable under the express terms of the act."

To the same effect are;

Devine v. Delano, 272 Ill. 166, 179-180, and
New York Cent. R. Co. v. Gapinski, [illegible] Fed. 948.

Engineer Fleming on the first trial of this case, as heretofore shown, testified that looking out of the window of his cab, he saw the coal chute man on the most southerly engine (Rec. 95) while standing on the side of the tender in the same place Bolle was standing on his engine; that he also saw him on the second engine from the south, but that at no time did he see Bolle who was standing on the engine immediately south of him and one engine closer to him, and but the length of two tenders from where he sat in his engine, and directly in his line of vision as he looked "rather intently" toward the coal chute man on the most southerly engine (Rec. 97). It also appears in the record that when the case was tried the second time, Fleming testified on that occasion that he did see a man on the tender of Bolle's engine for some 10 seconds or more before these engines were started (Rec. 98).

On this trial, this witness testified that while there was nothing to obstruct his view, he did not see the coal chute man there that night (Rec. 91). He stated, "I did not see a man on either one of those engines at any time that night, on the most southerly engine or the one next to it from the south at any time before Bolle got hurt. I did not see a man on the engine next to me (which was Bolle's engine) before the accident happened." As I remember now, the first I noticed of a man there was when the coal chute went up, perhaps it was when the coal chute went down; that is the first I noticed of a man there, was when the coal chute went up" (Rec. 94).

McManaman testified (Rec. 45):

> "* * * I was on the northbound main track sixteen or eighteen feet away from the engine, on the side away from the coal chutes, directly in front of them, the engines being between me and the coal chute man."

It will be noted that plaintiff was standing on the east side of the tank and that the cab of his engine was between him and McManaman, yet McManaman could see him plainly from where he stood close to the west track.

McManaman further testified that he saw the plaintiff on top of his engine taking coal at the time the coal chute man directed the engineer to move to the next chute. He saw him there for a minute or two before this order was given (Rec. 45). When asked by counsel for defendant why he didn't do something, he stated: "I didn't think they would do anything while that man was there" (Rec. 45).

We submit that if McManaman, who was an experienced railroad man, believed or had the right to assume that the engines would not, in the circumstances, be started until the coaling of the engine had been completed, surely it cannot be held that the plaintiff—a green, inexperienced employee—was required to anticipate that they would so start while the coal was actually being put into his engine and while he was standing in a place where the starting of them, without notice or warning to him, would necessarily injure him.

The fact that McManaman stated that he did not know that the man he saw taking coal on the engine was the plaintiff until after the accident happened, does not alter the situation or excuse the defendant for negligently starting these engines. If, as McManaman supposed, it was another coal chute man who was engaged in taking coal on plaintiff's engine, and not the plaintiff, nevertheless such movement would have constituted negligence in the circumstances and would undoubtedly have resulted in injury to the man coaling the engine.

In the case of *Illinois Central Railroad v. Siler*, 229 Ill. 390, it is said (Opinion, 393):

> "What is the proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. (*Fent v. Toledo, Peoria and Warsaw Railway Co.*, 59 Ill. 349; *Pullman Palace Car Co. v. Laack*, 143 id. 242; *West Chicago Street Railroad Co. v. Feldstein*, 169 id. 139.) It can only arise as a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference in the judgment of reasonable men, as to the inferences to be drawn from them."

In the case of *Ford v. Hine Bros. Co.*, 237 Ill. 463, at pp. 467, 468, the court said:

> "In other words, in order to make the negligent acts of the driver the proximate cause of the injury, it was not necessary that the driver should have foreseen the particular injury which occurred to appellee, but that it was sufficient if the driver, by the exercise of ordinary care, could have foreseen that some injury might result from his negligence. In *Illinois Central Railroad Co. v. Siler*, 229 Ill. 390, on page 394, it is said: 'In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury, and the particular manner of its occurrence, could reasonably have been foreseen (*City of Dixon v. Scott*, 181 Ill. 116).'"

Engineer Kucera testified that on the last movement northward, the engine bell was ringing and that when the engine stopped, the bell stopped (Rec. 70).

On cross-examination, this witness insisted that not until the last movement northward had been made and his engine been coaled and the chute adjusted, did he hear Bolle shout; that at that time the engines were all standing still (Rec. 76, 77).

Plaintiff introduced in evidence a rule of the defendant that "The engine bell must be rung when the engine is about to move * * * ."

It will be observed from the testimony of Kucera that the engine bell had not been ringing while the second engine from the south was being coaled and that the engines had been standing still all this time before he heard Bolle shout. Not a single witness in the case, aside from Kucera, whose negligent starting of the engines caused plaintiff's injury, testified that the bell was rung at the time the last movement northward was made. His unsupported testimony concerning the alleged ringing of the automatic bell prior to and during all the preceding movements made by these engines at Beach, has no weight, "legal" or otherwise. His testimony is not corroborated by any of the facts and circumstances in evidence. Bolle's outcry was heard by everyone around there just after these engines had been set in motion and while they were being moved northward—everybody except Kucera; and everyone around there agreed also that these engines were brought to a stop in response to Bolle's outcry—everybody except Kucera.

It is quite apparent that the mere ringing of a bell, if the engines were started immediately thereafter, without giving plaintiff an opportunity to escape injury, would have been a useless proceeding. We assume that the rule of the defendant that "the engine bell must be rung when the engine is about to move * * * " was for the purpose of warning persons in or about the engine in a place of danger in time to permit them to reach a place of safety before the engines should be started. Otherwise the requirement to ring a bell would serve no purpose.

It is quite obvious from the undisputed evidence in this case that if the defendant had instructed Bolle as to what he was expected to do upon the arrival of these engines at Beach, the accident and injury to him would have been avoided. It further appears from the evidence that if either McManaman or Terasky or Kucera, who operated the engines northward at the time plaintiff was injured, had exercised any care whatsoever toward preventing the movement of these engines while Bolle was engaged in coaling it, the accident could have been avoided.

Under a dominant rule of local law the work of coaling the defendant's engines could not be delegated to an independent contractor so as to relieve the defendant from liability for the negligent acts of such contractor.

Assuming, as the defendant claims, that it had some arrangement with an independent contractor to coal the engines of the defendant, upon their arrival at Beach, it is nevertheless liable for the negligent order given by this contractor, or his servant, concerning the movement or operation of these engines during the process of supplying them with coal at Beach.

It is a well recognized rule of law that a contractor will be regarded as the servant or agent of a corporation for which he is doing work, if he is exercising some charter privilege or power of the corporation, with its assent, which he could not have exercised independently of the charter of such corporation.

N. C. St. R. R. Co. v. *Dudgeon*, 184 Ill. 477.
Suburban R. R. Co. v. *Balkwill*, 195 Ill. 535.
City of Chicago v. *Murdock*, 212 Ill. 12.
Boyd v. *C. & N. W. Ry. Co.*, 217 Ill. 332.
Ramworthy v. *Heisen*, 214 Ill. 403.

Girdzus v. Van Etten, 211 Ill. App. 524, 532.
C. & G. T. Ry. Co. v. Hart, 209 Ill. 414.

But even if we assume that the operation of the engines at Beach while they were being coaled was not an exercise of the defendant's chartered authority and that such work was being done by an independent contractor, nevertheless, the defendant must be held liable in this case if its negligence, concurring with that of its independent contractor, resulted in injury to the plaintiff.

Flannagan v. Wells Bros. Co., 237 Ill. 82-87.
Pullman Palace Car Co. v. Laack, 143 Ill. 242.
Village of Carterville v. Cook, 129 Ill. 152.
The Consolidated Ice Machine Co. v. Keifer, Admr., 134 Ill. 481.

If the employees of the defendant, in response to an order by this alleged independent contractor, or one of his servants, started the locomotive engines while one of the defendant's employees was engaged at work for the defendant and while he was in an obviously dangerous and exposed position, the defendant would be liable for such negligent movement. And if, as a matter of fact, the train of engines in question was started and moved while the plaintiff was standing upon the tender of his engine, as alleged in the plaintiff's declaration, the defendant could not avoid liability, because the contractor, in such circumstances, must be regarded as the agent or servant of the defendant.

Moreover the evidence on this trial shows that defendant employees had actual notice and knowledge of plaintiff's presence on his engine in time to have warned him or to have prevented the negligent starting of these engines.

In *Pullman Palace Car Co.* v. *Laack*, 143 Ill. 242, at p. 256, it is said:

> "It necessarily follows, that in the discharge of the duty resting upon and owing by the master to the servant, the acts of the person authorised by the master to perform the duty are the acts of the master. The liability of the master does not depend upon who performs the duty, but upon the existence of the duty itself, which the master must perform, and he cannot, by delegating it to another, absolve himself from liability for its non-performance."

Where several causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them. It is sufficient that his negligence is an efficient cause but it need not be the last or nearest cause.

> 45 Corpus Juris, Section 485, pp. 920, 921, 922.
> *Fisher* v. *Chicago, etc. R. Co.*, 290 Ill. 49, 56.
> *Waschow* v. *Kelly Coal Co.*, 245 Ill. 516, 520.
> *Thomas* v. *Chicago Embossing Co.*, 307 Ill. 134, 139, 140.

In the case of *Kraut* v. *Frankford, etc. Pass. R. Co.*, 160 Pa. St. 327, the court said (p. 335): "It is useless to speculate as to which was the remote and which the proximate cause."

Where there are concurrent causes that produce an injury, an inquiry about the proximate cause is not pertinent.

> *Memphis Consolidated Gas Co., etc.* v. *Creighton*, 183 Fed. 552, 555.

VI.

Plaintiff was acting within the scope of his employment and was not a mere volunteer.

In the case of *Ambrosio v. Boston & M. R. R.*, 81 N. H. 110, 124 Atl. 551, which was an action for personal injuries under the Federal Employers' Liability Act, the Supreme Court of New Hampshire stated:

> "If the term 'arising out of and in the course of the employment' is to be given its ordinary meaning or any meaning of which it is fairly capable, it is obvious that the plaintiff was injured in such an accident, for it can be found that he thought he was doing what he was expected to do when he was injured, and that the defendants ought to have anticipated that he would so understand his instructions. In other words, it can be found that he was 'on duty' when the accident happened. *Railroad* v. *Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 309, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Barber* v. *Company*, 70 N. H. 311, 108 Atl. 690; *Wheeler* v. *Corporation*, 77 N. H. 551, 94 Atl. 265."

See also:

> *Ward Furniture Mfg. Co.* v. *Pickle* (Ark.) 295 S. W. 727, 729.

In the case of *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497, this Court said, p. 508:

> "It is most earnestly insisted that the findings establish that Campbell was not in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee and puts himself in the attitude of a stranger or a licensee. The cases

cited are those where an employee intentionally has gone outside of the scope of his employment or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him it of course does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberntely and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect, this was nothing more than negligence on his part, and not a departure from the course of his employment."

In the case of *Roussel v. Company*, 80 N. H. 254, the court said, p. 256:

> "The defendants base their contention, that it cannot be found the plaintiff was acting within the scope of his employment when he was injured, on the fact he was not instrpcted in terms to remove the lap feeder. It does not follow from that, however, that he was not doing what he was employed to do.
>
> The test to decide that question is not to inquire whether he was told in so many words to do the act in question, but whether the ordinary man in his situation would have understood that he was expected to do it. *Boody v. Company*, 77 N. H. 208."

In *Bishop v. Victor Chemical Works*, 209 Ill. App. 220 (Opinion, 226), it is said:

> "He could misunderstand, misapprehend, misinterpret or disobey it without becoming a mere volunteer. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497 (12 N. C. C. A. 1083)."

In *Brooks Tomato Prod. Co. v. Indus. Com.*, 311 Ill. [illegible], an award was rendered in favor of defendant in error under the State Workmen's Compensation Act. It was contended by plaintiff in error that the employee was not engaged in the scope of his employment at the time of his injury. The evidence shows, without contradiction, that it was no part of defendant in error's duty to go to the second floor of the building or to perform the task he was engaged in when injured; that he was not expected to do this work and that no part of his duty called him to the second floor. The court held that while he was under no obligation to go to the second floor, he was attempting to engage in work promoting the interests of his employer and in the circumstances was held to have been in the course of his employment.

To the same effect are:

Porter Co. v. Ind. Com., 301 Ill. 76.
Randall Co. v. Ind. Com., 305 Ill. 561.
Chicago, etc. Co. v. Ind. Com., 303 Ill. 540.

VII.

Plaintiff did not assume the risk of the negligent act or acts of defendant's employees suddenly and unexpectedly arising, and the doctrine of assumed risk is inapplicable to the facts in the present case.

Our opponents fail to note the distinction between assumption of risk and contributory negligence. An employee assumes the ordinary risks of his employment and also those extraordinary risks and hazards which are known to him and fully appreciated by him or which are so plainly observable that he is presumed in law to have known of them—even though they may be due to the master's negligence—but such employee certainly does not sume extraordinary risks attributable to the negligence of his employer until he becomes aware of them. Obviously he does not assume the risk of a danger suddenly arising from the negligence of the employer unless he has knowledge of the negligence and the dangers arising therefrom or unless they are so plainly observable that he may be presumed in law to know of them.

Although in certain cases some difficulty may arise in distinguishing them, the general rule, based on all of the authorities, is that assumption of risk is based on the contract of employment, or on the maxim *"volenti non fit injuria"*—"he who consents cannot receive an injury," while contributory negligence is based on tort.

Since the decision in the case of *Seaboard Air Line v. Horton*, 233 U. S. 492, wherein the distinction between contributory negligence and assumed risk is fully discussed, this Court has many times reaffirmed the doctrine announced in that decision. The doctrine thus announced in these cases clearly shows that the risks that may be assumed by an interstate employee are of two kinds—ordinary and extraordinary. An employee has the right to assume that his employer has exercised due care for his safety and is not to be treated as assuming extraordinary risks arising from the negligence of the employer unless he has knowledge of them and the dangers arising therefrom, or unless they are so plainly observable that he may be presumed as a matter of law to have known of them. Roberts on Federal Liability of Carriers, 1st Ed., Vol. 1., Secs. 557, 558, and cases cited therein.

The distinction between contributory negligence and assumed risk is fully discussed in the *Horton case, supra.* A judgment for the plaintiff in that case was reversed because the court refused an instruction tendered on behalf of the defendant correctly stating the law on this subject as announced in the opinion. A judgment for the plaintiff was later reaffirmed in the same case, 239 U. S. 595.

In the case of *Yazoo & Miss. R. R. v. Wright*, 235 U. S. 376, wherein a locomotive engineer came to his death when the engine which he was operating came into collision with some coal cars which he supposed were in the clear, this Court said, p. 380:

> "The impossibility of deducing assumption of the risk from the facts stated is cogently demonstrated by the arguments advanced to establish that the risk was assumed. Thus it is urged that as in a railroad yard there was danger to arise from the protrusion of cars negligently placed by employees of the company, a danger which the engineer must have known might arise, therefore he assumed the risk of such danger. And again the argument is that even although the engineer did not know of the protruding cars and therefore did not consciously incur the great risk to result from the collision, yet as by proper precaution he could have discovered the fact that the cars were protruding, he must be considered to have assumed the risk which resulted from his want of care. But both these arguments have no relation to the doctrine of assumption of the risk and only call for the application of the principle of contributory negligence or of fellow servant."

In *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U. S. 1, it is said, p. 12:

> "The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. *The act more immediately leading to a specific accident is called negligence.* But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant *from* the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion) then, *unless great care be taken*, the

servant's rights will be sacrificed by simply charging him with assumption of risk under another name.''

In *Gila Valley, etc., Ry. v. Hall*, 232 U. S. 94, at p. 101 of the opinion, it is said:

> ''An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it.'' (Citing cases.)

To the same effect are:

Erie R. R. Co. v. Purucker, 244 U. S. 320.
Grannon v. Donk Bros. Coal Co., 259 Ill. 359, 366.

Under the Federal Employers' Liability Act, the burden of proving that the plaintiff assumed the risk of injury or was guilty of contributory negligence is upon the defendant.

Seaboard Air Line Railway v. Moore, 228 U. S. 433.
Central Vermont Ry. Co. v. White, 238 U. S. 507.
Roberts on ''Federal Liability of Carriers,'' Vol. 1, 1st Ed., Secs. 426, 427.

Fisher v. C. R. I. & P. Ry. Co., 290 Ill. 49, 56.
[illegible] v. Illinois Central R. Co., 220 Ill. App. 112.

VIII.

The trial court did not err in the giving or refusal of instructions.

It is urged by defendant (Brief, pp. 54, 55) that the court erred in refusing to give certain instructions tendered in its behalf. It is claimed that at least one of two instructions refused (numbered 6 and 21) should have been given "as a matter of fairness to the jury as well as to the defendant" informing the jury that in the event they found the plaintiff was not entitled to recover under the Federal Employers' Liability Act, such finding would not deprive the plaintiff "of any damages, or right to damages, which he has or may have under the laws of the State of Illinois, or under any other law." These instructions further advised the jury that a verdict of not guilty "does not mean that plaintiff is not entitled to be paid for his injuries in or by some other action or proceeding * * *."

We set out the substance of these instructions for the purpose of illustrating the type and character of instruction which the court refused to give on behalf of the defendant. These two instructions were manifestly erroneous in directing the attention of the jury to matters wholly irrelevant and extraneous to the issues in this case. Furthermore, they clearly intimated and assumed that the plaintiff could maintain another action in the event the jury found the defendant not guilty, if he failed to prove actionable negligence or if he failed to prove he was engaged in interstate commerce when injured.

Defendant's given instructions, as a series, embrace every possible theory of defense, viz., interstate commerce, scope of employment, actionable negligence on the part of the defendant, and contributory negligence on the part of the plaintiff. The rules of law announced in many of these instructions were repeated over and over again and a number of them were more favorable to defendant than the law required. All of defendant's refused instructions were either fully covered by its given instruction or were misleading and argumentative. Many of them gave undue prominence to isolated items of the evidence. A number of them usurped the function of the jury and directed the jury to find a verdict for the defendant in the event they found one single evidentiary fact, not necessarily decisive of any issue in the case, in favor of defendant. A number of these refused instructions directed a verdict for the defendant and could not, under any circumstances, have been properly given if the case were submitted to the jury for determination.

We respectfully submit that a casual reading of defendant's refused instructions will demonstrate that the court did not err in refusing them.

An instruction which singles out one or two facts in a case is objectionable.

The jury must consider all of the evidence in the case and an instruction should not be limited to one single act which combines with others to create a liability and state that such act alone would not render the party liable. (*I. C. R. R. Co. v. Aland*, 192 Ill. 40; *Chicago Gen. Ry. Co. v. Carroll*, 189 Ill. 273.)

In the case of *Cheney v. Baber*, 304 Ill. 362, the court, in considering the propriety of singling out a specific fact or facts in a case, and instructing thereon, said, p. 372:

> "Instructions ought not to select one item of competent evidence and inform the jury that that item of itself does not establish the case."

IX.

The defendant was not prejudiced by the alleged procedural errors.

The chief error complained of by defendant is that counsel for plaintiff was permitted to state, over objection, that defendant's foreman McManaman testified on this trial that the engines were moved northward just prior to Holle's injury, without the ringing of a bell and without giving plaintiff any notice or warning that they were about to be moved.

Assuming that counsel for the plaintiff erred in his recollection concerning the testimony of this witness on this trial, we nevertheless submit that it was an excusable error, in view of the number of times this case was tried, and in the light of the undisputed evidence as to what actually occurred prior to and at the times these engines were moved.

It is obvious from McManaman's testimony to the effect that he saw a man on top of Holle's engine engaged in coaling it both before and after the order was given to move the engine but that he did nothing although he "had time to do something" because he did not think they would "do anything while that man was there," clearly indicates and proves that the bell on the engine was not ringing. Moreover, it is apparent from McManaman's testimony that in stating that he didn't think they would do anything while the man was there,'' nothing was being done in the way of ringing a bell or giving any other warning that the engines were about to start. That was the reason for his inaction. If the bell had been rung before the engines started, it would have been notice to McManaman that the engines were about to start. His statement that he had no idea that they would do anything while the man was up there negatives the ringing of the bell on the engine.

It will be observed that Kucera was the only witness who testified that the engine bell was ringing. He testified that every time the engines moved, he turned on the automatic bell ringer and that when they stopped, he turned it off and the bell stopped ringing (Rec., 76).

This witness had previously testified on direct examination that after he got on the second engine from the south, he pulled the bell cord, started the automatic bell ringing and moved, on the coal chute man's instructions, to spot the engine for coal; th[illegible]e engines were spotted and coal was taken into the seco[illegible] engine from the south; that during this time he was sitting on the engineer's seat in the cab of his engine (Rec., 69, 70); that after the coal chute man put coal in the second engine from the south, the coal chute was adjusted and placed back in the clear; that it was after all this occurred and while the engines were stopped, that he first heard Bolle "holler" (Rec., 70, 71). Every other witness in the case testified that Bolle was injured when the engines were being moved northward and that they were stopped in response to his outcry.

We call attention to these undisputed facts for the purpose of showing that Kucera's testimony is entitled to no weight or credence and for the further and additional reason that on his own testimony the engines were standing and the automatic bell was shut off for some time prior to Bolle's injury.

The jury must have concluded from the evidence in the case that the bell was not rung and that no warning was given plaintiff before the starting of these engines, or in any event that no sufficient warning was given him to have enabled him to avoid injury.

In view of the fact that no witness testified concerning the ringing of the bell except Kucera, and in view of the further fact that according to his testimony the accident happened after the second engine from the south was coaled, and while it was standing, the jury were fully warranted in believing that the bell was not rung.

The statement made by counsel for the plaintiff that McMananian so testified on this trial, even though inaccurate, had to do with but one item of evidence tending to establish negligence on the part of defendant and had reference to an obvious and demonstrated fact, viz.: that the bell was not rung.

Furthermore, there is no evidence in the record showing or tending to show that the ringing of the bell, if it had been rung, served as a warning to the plaintiff. The only testimony on the subject is that the bell was rung contemporaneously with the starting of the engine. It is manifest that the ringing of the bell at the same instant the engines were started, while Bolle was in a place of danger and while coal was being emptied into the tender of his engine, would serve no purpose as a warning to him and would have been a useless proceeding.

The gist or gravaman of plaintiff's cause of action, as heretofore pointed out, was the negligent starting of these engines while plaintiff was in a dangerous and exposed position, coaling his engine. Whether the bell was rung or not, insofar as proving actionable negligence under the first and additional counts is concerned, is not a trolling factor in the case, since there was ample evidence to sustain these counts regardless of the ringing of the bell.

It is elementary that in action for torts, every allegation—even of matters of substance—need not be proved, as the statement of a tort is in its nature divisible and part of the tort or injury is sufficent to support the declaration.

In the case of *Supolski v. Ferguson & Lange Co.*, 272 Ill. 82, it is said, at pp. 86, 87:

> "The chief argument on the part of plaintiff in error as to the third count is that it charged, among other things, that plaintiff in error had not adopted a system of giving due and timely warning to those in the vicinity of the drop, whereas the evidence clearly shows that plaintiff in error had established such a system, and that therefore there was a variance between the allegations of this count and the evidence. The count was sufficient to sustain a recovery without proving this allegation. In actions of tort it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case. (*New York, Chicago & St. Louis Railroad Co. v. Blumenthal*, 160 Ill. 40; *City of Rock Island v. Cuinely*, 126 *id.* 408)."

In the case of *People v. Michael*, 280 Ill. 11, at p. 13, the court said:

> "Courts no longer adhere to the technical rule that a judgment must be reversed where the record shows that error was committed on the trial. It is, we believe, universally agreed by courts now that only error prejudicial to the complaining party requires a reversal of the judgment."

Where it is obvious that no decision more favorable to defendant would result from another trial, a judgment will not be reversed although error was committed by the [illegible] court.

Pridmore v. C. R. I. & P. Ry. Co., 275 Ill. 396.

Objectionable actions and words will not reverse a judgment which appears substantially just on the merits. *St. Bernards Coal Co. v. Swan*, 128 Ill. App. 287 (affirmed 227 Ill. 586).

Where two juries have passed upon a case and have found the same way, an error to reverse must be clear and palpable. *City of Chicago v. McNally*, 128 Ill. App. 376 (affirmed 227 Ill. 14).

In *People v. Stokes*, 334 Ill. 200, at p. 210, it is said:

> "This Court has held in many cases that where it can be said from the record that the errors assigned could not reasonably have affected the result of the trial, the judgment of the trial court should be affirmed, and that a judgment in such case should not be reversed and the cause remanded so that a better record may be made on another trial. (*People v. Heard*, 305 Ill. 319; *People v. Halpin*, 276 *id.* 363; *People v. Cleminson*, 250 *id.* 135.)"

The jury were told in instruction No. 1 (Rec., 102) that the case must be decided upon the evidence under the instructions of the court, and not upon the statements of counsel outside of the evidence or unsupported by the evidence; that they should not take into account or be influenced "by any statement, declaration or remarks of counsel * * * unless same are based upon or are justly and fairly deducible from the evidence."

And defendant's given instruction No. 20 (Rec., [illegible]) reads as follows:

> "If you find from the evidence that the movement of the engines, at the time of the accident, was started without the ringing of the bell on the engine that operated that movement, you cannot find that that [illegible]

was negligence on the part of the defendant for the results of which it would be liable to the plaintiff, unless you also find from a preponderance of the evidence that the other employees of the defendant or some or one of them, knew, or in the exercise of ordinary care should have known, that such movement would result in injury to the plaintiff and had such knowledge or knew such fact for a long enough time ahead of the movement of the engines to have, in the exercise of ordinary care, taken some course that would have prevented such movement."

In the case of *Noble & Ware v. Mitchell*, 100 Ala. 519, 25 L. R. A. 238, the court said:

> "The bill of exceptions states that, in the concluding arguments of plaintiff's counsel to the jury, he stated 'that the evidence showed that defendants had taken $82.50 from plaintiff and insured him in an insolvent company.' The defendants objected to this statement of counsel, and moved the court to exclude it from the jury. This question is presented in a somewhat different form from that heretofore considered. It will be seen that the statement is 'that the evidence showed,' etc. This was not the assertion of a fact as being within the knowledge of counsel, outside of and without reference to the evidence. *Where counsel honestly differ as to the facts in evidence, or are honestly mistaken as to correct inference from proven facts, there is not that transgression of the limits of legitimate arguments which will cause a reversal of the case.* While we think the statement was not warranted by the evidence, and its tendency may have been to prejudice the defendants before the jury, the fact itself, whether true or false, could have no matrial bearing on the issue." (Italics ours.)

Where two juries have returned similar verdicts and the trial judge has each time approved those verdicts, it is a rule of long standing that courts of review will be extremely reluctant to interfere with such verdicts.

[illegible] v. Chicago City Ry. Co., 209 Ill. App. [illegible].
Merrill v. Merrill, 215 Ill. App. 602.
[illegible] v. Chicago Great Western R. R. Co., 169 Ill. App. 89.
Bates v. Danville Street R. & L. Co., 190 Ill. App. [illegible].
Larson v. Ward Corby Co., 196 Ill. App. 109.
[illegible] v. [illegible], 197 Ill. App. 211, 213.

The alleged procedural errors are not subject to review in this court.

In *Central Vermont Ry. Co. v. White*, 238 U. S. 507, the rule is announced that this Court considers only assignments relating to matter of practice, pleading and evidence which involves a construction of the Federal statute. It is said, p. 509:

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and the various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, cannot be considered on writ of error from a State Court. *Seaboard Air Line v. Duvall*, 225 U. S. 477, 482."

This Court will not review non-Federal questions which do not in their essence involve the existence of the right to recover under the Federal statute.

Seaboard Air Line v. Padgett, 236 U. S. 668.

3.

The question of excessive damages is a matter to be dealt with by the State Courts, and does not present a question for re-examination in this Court.

Southern Ry. v. Bennett, 233 U. S. 80, 87.
Lincoln v. Power, 151 U. S. 436.
Herencia v. Guzman, 219 U. S. 44, 45.
Louisiana Oil Refining Corporation v. Reed et al., 38 Fed. (2d) 159-162.
Chicago & R. I. Ry. Co. v. [illegible], 99 Fed. (2d) 597-599.
St. Louis Ry. Co. v. Craft, 237 U. S. 648.

For the reasons stated and upon the authorities cited it is respectfully submitted that the judgment of the Appellate and Supreme Courts of Illinois should be affirmed.

Counsel for Respondent, Eugene Rolfe.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. [illegible]

No. [illegible]

(Docket No. 312.)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

[illegible]

EUGENE BOLLE.

Petition for [illegible]

[illegible]

[illegible]

IN THE

Supreme Court of the United States

October Term, A. D. 1931.

No. 60.

(Docket No. 917.)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner.

vs.

EUGENE BOLLE,

Respondent.

Petition for Rehearing on Behalf of Respondent, Eugene Bolle.

Comes now the above named respondent, Eugene Bolle, and presents this, his petition for a rehearing in this cause, said cause having been reversed by this Honorable court on November 23, 1931, and in support thereof respectfully shews the following reasons for granting a rehearing.

The Court disposes of our contention that respondent's participation in the movement of the four engines from Waukegan to Beach, apart from his general employment, brought him within the purview of the Federal Act, by the brief statement that:

> "Its movement was in no way related to the contemplated employment of the other three locomotives

in interstate transportation; and its use differed in no way from the use of the stationary engine when that was available."

The Court by this language recognizes the interstate status of three of the four engines and of the men employed thereon.

The Court recognizes the fact that three of these four engines were instrumentalities of interstate commerce and being prepared for use as such. Throughout the movement in question respondent's engine was the second one from the north and the third from the south in the string of engines. The effect of the decision, therefore, is that three-fourths of the movement was in interstate commerce (or transportation) and that the other fourth was not.

The inclusion of respondent's engine in this train of engines certainly did not affect or alter the interstate character of the movement. The double aspect of the work or of the purpose of the movement is of no consequence in determining the applicability of the federal statute to the work in which the petitioner was engaging.

The test in determining whether employees are engaged in interstate commerce is not whether the major part of the freight in a train constitutes interstate traffic. A single shipment of interstate commerce impresses the entire train with an interstate character so that the employees as well as the cars are subject to national laws.

N. & W. R. Co. v. United States, 101 C. C. A. [illegible], 177 Fed. 623;

Hester v. East Tennessee, etc. Co., 254 Fed. 7

Vol. 2 Roberts Federal Liability of Carriers (2d ed.), Sec. 848, p. 1090.

"The demands of the federal law being paramount, existence of interstate service in any degree control the situation and renders the federal liability statute applicable.''

Vol. 2, Roberts Federal Liability of Carriers (2d ed.), Sec. 727, p. 1375;

New York Cen. and H. R. R. Co. v. Carr, 238 U. S. 260;

Northern Pacific v. Washington, 222 U. S. 370, 375.

The Court, in concluding that the use of the locomotive engine which was in charge of respondent ''differed in no way from the use of the stationary engine when that was available'' has overlooked the many and obvious distinctions between firing a stationary boiler and caring for a locomotive engine while the same is being used and hauled over a main line and while it is coupled with and between other locomotive engines which are being prepared and definitely assigned for use in interstate transportation.

Respondent, who was in charge of the engine in question while it was being operated from Waukegan to Beach and return, was not only engaging in train service and subject to all the dangers and hazards incident to the operation of cars and trains over petitioner's main line, but, he was engaging in a service that since 1924 is covered by the provisions of the Federal Boiler Inspection Act, which act, of course, could have no application to one operating a stationary boiler.

That act, as amended June 7, 1924, provides:

> ''That it shall be unlawful for any carrier to use or permit to be used on its line, any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put * * *''

It is insisted by petitioner, and in effect held by the Court, that respondent was not engaged in the actual movement of the train of engines. The traveling engineer of petitioner deemed his presence necessary, as is evidenced by his order to respondent's straw boss to procure a man for each engine and the order of the latter to get up on his engine and go to Beach (Rec. 19). He had to watch the fire and water on one of the engines, which was coupled between the others; if this precaution were neglected, it is obvious that a boiler explosion might have occurred, with disastrous results not only to respondent's engine, but to the interstate engines ~~as~~ well. It is manifest that unless respondent's engine were watched, none of the other engines, nor the train as a whole, could have made the trip in safety. It follows that respondent's presence was indispensable to the safety of the interstate engines and their crews. Respondent, therefore, contributed directly to the movement of the interstate engines, since his presence was vital to the safety of the operation.

In *Northern Pacific v. Washington*, 222 U. S. 370, 375, this Court said:

> "In view of the unity and the indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."

The statement that respondent's engine "was in no way related to the contemplated employment of the other three locomotives in interstate transportation," while literally true, is, nevertheless, misleading in that it is based upon the erroneous assumption that the movement of the other three engines from Waukegan to Beach for the purpose of supplying them with fuel for use in interstate transportation is something entirely disassociated from their contemplated use. Under this Court's previous decisions, preparing an instrumentality for use in interstate commerce is actually a part of that commerce.

In *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248; 58 L. Ed. 591, it is said (Opin. 260):

> "It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts, performed as a part of interstate commerce and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant."

In the case of *C. & A. R. R. Co.* v. *Industrial Commission*, 288 Ill. 603, the court, at p. 610, quotes with approval from the case of *Graber* v. *Duluth S. S. & A. Ry. Co.*, 159 Wis. 414, as follows:

> "* * * The law does not permit of splitting up a service which is in its nature an entirety, into its various steps or elements. * * * All work, so closely related to interstate commerce business as to be practically inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former."

Moreover, respondent's engine was a live engine (Rec. 39). It would have been used in propelling all four engines on the next movement to be made at the coal chutes if respondent had not been injured (Rec. 77).

While petitioner's counsel urged throughout their brief that respondent could maintain an action for compensation under the Workmen's Compensation Act of Illinois, the fact is that respondent neither made nor filed any claim for compensation under the state act. It is quite obvious that had he done so his claim would be defeated by the proof in the record here that petitioner, his employer, at the very moment of his injury, was engaging in a preparatory movement in aid and furtherance of interstate transportation.

Under this Court's decision he could not recover under the Federal Act because he was not engaged in interstate commerce. He is, therefore, deprived of a remedy under either act.

The Federal Employers' Liability Act "is to be construed liberally to fulfill the purposes for which it was enacted * * *."

Jamison v. *Encarnation*, 281 U. S. 635, 640.

The courts have given a liberal construction to the Federal Employers' Liability Act with the intention of including every employee within the act that reasonably could be included.

In the case of *Horton* v. *Oregon-Washington R. & Navigation Co.*, 130 Pac. 897, it was held (p. 899) that the Federal Employers' Liability Act was intended to include every person who could be so included within the purview of the constitutional power; that it was intended to include everybody whom Congress could include.

To the same effect is the case of *Colasurdo* v. *Central R. R. of New Jersey*, 180 Fed. 832, 837.

In the case of *Armbruster* v. *Chicago R. I. & P. R. Co.*, 166 Iowa 155, the court said (p. 172):

> "The federal courts in applying the Employers' Liability Act of Congress have given it liberal construction and their construction is binding on the State courts."

Under this Court's decision, the anomalous situation is presented wherein the petitioner and all of its employees engaging in the movement in question, with the single exception of respondent, were subject to the provisions of the Federal Act, and these employees, in the event of injury through petitioner's negligence, could have maintained actions under that act, but respondent alone could not.

RESPONDENT'S GENERAL EMPLOYMENT.

We submit that the opinion in this case, if adhered to, overrules all that has been said by this Court in the following cases: *Philadelphia B. & W. R. R. Co. v. Smith*, 250 U. S. 101; *Erie R. R. Co. v. Collins*, 253 U. S. 77, and *Erie R. R. Co. v. Szary*, 253 U. S. 86. These cases, although cited and quoted from at length in respondent's brief, are not mentioned in the opinion, and obviously have not been considered by the Court in deciding that respondent's general employment was not in interstate commerce.

Smith's duties were to cook meals, make the beds, etc., for a gang of bridge carpenters in a camp car which had been standing on a siding for several weeks. While cooking a meal for the bridge carpenters and himself, a car, to which the camp car was attached, was struck by an engine and he was injured.

Collins' duties were to attend a signaling tower used in the operation of trains engaging in interstate and intrastate commerce, and also to operate a gasoline engine which was used to pump water into a tank from which it could be conveniently taken when required for use of engines engaging in both classes of commerce. While engaged in operating the gasoline engine he was injured by an explosion of gasoline.

Szary's duties were to dry sand in stoves and supply it when needed to defendant's locomotives which were being used in both interstate and intrastate commerce. Following the sanding of the last engine, he removed the ashes from one of the stoves and carried it in a pail to a nearby ash pit. He emptied the pail and went to the engine room to get a drink of water, and while returning for the pail and crossing a track, was hit by an engine. In other words, Szary, when injured, was engaged in an errand incidental to caring for a stove which was used in preparing or heating sand for storage.

Bolle, the respondent, in his general employment was engaged in operating a heating plant or a locomotive used as a substitute when it was out of commission, which supplied heat continuously during the winter time, *inter alia*, to bunk cars where petitioner's employees "engaged in the track maintenance and bridge and building departments" ate and slept; to passenger coaches which were taken out of trains moving out of Chicago "before being taken up by other interstate trains to be carried back," and to heat a turntable for the purpose of keeping it from freezing and to prevent the formation of ice on the rails.

In supplying heat to the bunk car for the comfort and convenience of petitioner's bridge and building carpenters, Bolle was furnishing the same class of service and to the same class of employees which it was held in the *Smith* case constituted interstate transportation. In other words, Smith was forwarding the interstate transportation of the petitioner by preparing the food and beds of the bridge carpenters while Bolle was forwarding the interstate business of the petitioner by supplying heat to the bridge carpenters, a necessary and essential service at that season of the year.

Cases cited by the Court are to be distinguished from the present case.

In referring to the character of the work in which respondent was engaged, the Court, in its opinion, states:

> "Certainly that work was no more closely related to transportation than was that of the employee in

the *Harrington* case who placed coal in the chutes for the use of locomotives engaged in interstate transportation."

We respectfully submit that the Court has apparently misconceived the nature of the work in which Harrington was engaged. He was not, as the Court suggests, placing coal "in the chutes." Harrington, a switchman, was engaged, as a member of a switching crew, in switching coal which had been standing on a storage track for a week or more, to a coal shed where it was to be placed in bins and supplied as needed for engines engaged in both kinds of traffic. Harrington's duty "was solely in connection with the removal of the coal from the storage tracks to the coal shed. This Court held that Harrington, while engaged in the removing of the coal from the storage tracks, was not engaged in interstate commerce.

The Court, in its opinion in the instant case, also cites the *Cousins* case as bearing upon the character of the work in which respondent was engaged. Cousins at the time of his injury was merely wheeling or delivering a barrow of coal intended to be used in heating a repair shop. His duties as regards this coal terminated when the coal was delivered to the shop, and he had nothing to do with the stoves or the distribution or use of the coal after it was delivered. Cousins was not operating either a stationary boiler or a locomotive used in heating continuously during the wintertime such instrumentalities as defendant's bridge and building carpenters' bunk car or interstate passenger coaches or the various other interstate instrumentalities mentioned in the opinion.

We submit that the *facts* of the *Cousins* case are not fairly comparable to those in the instant case since the employment Cousins was engaged in when injured bore the same relation to his employer's interstate transportation, as did the work of mining coal in the *Yurkonis* case, and the work of *Harrington* in switching coal to a coal chute to be later put into bins or chutes, which this Court held to be too remote to be practically a part of interstate transportation.

The Court in its opinion also refers to the case of *New York Central Railroad Co.* v. *White*, 243 U. S. 188, in which it was held, following the test announced in the *Shanks* case, "that employment in guarding tools, intended for use in the construction of a new depot and tracks to be used in interstate commerce, had no such direct relation to interstate transportation as was contemplated by the Employers' Liability Act."

This Court has uniformly held that employees engaged in the original construction of tracks, tunnels, bridges, buildings, engines or cars which have never been used as instrumentalities of interstate commerce, are not employed in such commerce within the meaning of the statute. (*Raymond* v. *Chicago, M. & St. P. R. Co.*, 243 U. S. 43; *Minneapolis & St. L. R. Co.* v. *Winters*, 242 U. S. 353; *Pedersen* v. *Delaware, L. & W. R. Co.*, 229 U. S. 146.)

While the *White* case, *supra*, was cited by the Court in support of the view that the test in the *Shanks* case had never been departed from, the facts in the case bear no similarity to the facts in the instant case and that case, likewise, is not authority for holding that respondent was not engaging in interstate commerce.

In the *Shanks* case, 239 U. S. 556, the plaintiff was engaged solely in taking down and putting into a new location an overhead counter shaft through which power was communicated to some of the machinery used for repairing locomotives used in interstate transportation. Under the decisions of this Court, an employee actually engaged in repairing engines or cars would not come within the purview of the Federal Act unless at the time of injury he was engaged in repairing a car or engine that had been definitely assigned for use in interstate transportation or which had been temporarily withdrawn from such service.

It is apparent from the facts in the *Cousins* and *Shanks* cases that these employees, when injured, were several steps removed from employment in interstate commerce.

It has never been the contention of respondent that the test announced in the *Shanks* case was not the proper one for determining whether or not respondent, at the time of his injury, was within the purview of the Federal Employers' Liability Act.

The question of the wording of the test arose in the case through the complaint of petitioner that in an instruction given to the jury on behalf of respondent, the word ''commerce'' was used instead of the word ''transportation.'' We respectfully submit, that so far as the work, in which respondent was engaged, is concerned, whether the word ''transportation'' be used as the *Shanks* case or ''commerce'' as used in the *Collins* case, plaintiff's employment in any event was within the purview of the Federal Act.

We again respectfully direct the Court's attention to the case of *Grussewsky v. Director General of Railroads*, 96 Conn. 119, cited at page 23 of respondent's brief. There the injured employee, who was held to have been in interstate commerce, was engaged in operating a heating plant which transmitted steam through pipes to cars on his employer's tracks, with which cars connection was made by steam plugs. The steam generated was used in both interstate and intrastate commerce. The employee did not make said connections but operated said heating plant, and five or six times an hour brought coal to the boiler from cars on the tracks.

We also respectfully ask the Court to reconsider the following cases cited at pages 24 and 25 of our brief:

Hiser v. *Davis, Director General of Railroads*, 234 N. Y. 300.

Guida v. *Pennsylvania R. R. Co.*, 183 App. Div. 822, 171 N. Y. S. 285 (affirmed 224 N. Y. 712).

Bosue v. *N. Y. N. H. & H. R. R. Co.*, 256 N. Y. 427.

as we believe that these authorities definitely establish that respondent's employment was in interstate commerce.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that upon said rehearing this Court vacate its order reversing the cause and that it then affirm the judgment in favor of Eugene Bolle, respondent herein.

If, however, this Court should decline to grant a rehearing herein, then it is respectfully urged that judgment be rendered and the cause remanded without prejudice to any further proceedings by amendment or new action other than under the Federal Employers' Liability Act.

Joseph D Ryan

Counsel for Respondent, Eugene Bolle.

Certificate of Counsel.

I, Joseph D. Ryan, counsel for the above named Eugene Bolle, respondent herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Joseph D. Ryan

Counsel for Respondent, Eugene Bolle.

SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1931.

Chicago and North Western Railway Company, Petitioner, *vs.* Eugene Bolle.	On Writ of Certiorari to the Appellate Court of the State of Illinois, Second District.

[November 23, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner is a common carrier by railroad engaged in the interstate and intrastate transportation of passengers and freight. Respondent was employed by petitioner to fire a stationary engine which was utilized to generate steam for the purpose of heating the passenger depot, baggage room, and other structures and rooms used for general railroad purposes at Waukegan, Illinois. The steam was also used to heat suburban passenger coaches while standing in the yards. Some of these coaches, taken off of interstate trains moving out of Chicago, were heated when necessary before being taken up by other interstate trains to be carried back. A way car and bunk cars, converted into stationary structures and occupied by some of the employees engaged in the track maintenance and bridge and building departments, were likewise heated; and sometimes steam was used to prevent freezing of a turntable used for turning engines employed both in interstate and intrastate traffic.

On the occasion in question, the stationary engine was temporarily out of order, and, in accordance with the usual practice, respondent had been making use of a locomotive engine as a substitute. While thus employed he was directed to accompany this locomotive engine to a place about four miles distant to obtain a supply of coal. For that purpose the engine was attached to and moved with three other locomotive engines then being prepared for use in interstate transportation. While coal was being taken upon one of the locomotives, respondent was seriously injured, through what is alleged to have been the negligence of petitioner.

The sole object of the movement of the substitute engine was to procure a supply of coal for the purpose of generating steam. Its movement was in no way related to the contemplated employment of the other three locomotives in interstate transportation; and its use differed in no way from the use of the stationary engine when that was available.

There is evidence that respondent, at other times, had been engaged in supplying other engines with coal and water, firing live engines, and turning a turntable; but his employment at the time of the injury was confined to firing the stationary or locomotive engine for the sole purpose of producing steam. The character of the work which he did at other times, therefore, becomes immaterial. *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556, 558; *Chi., Burlington & Q. R. R.* v. *Harrington*, 241 U. S. 177, 179.

The action was brought under the Federal Employer's Liability Act (c. 149, 35 Stat. 65; Title 45, c. 2, U. S. C.) to recover damages for the injury. There have been three trials of the case. In the first the verdict and judgment was for the respondent, which upon appeal was reversed by the intermediate appellate court, upon the ground that the evidence failed to show that respondent was engaged in interstate commerce when injured. 235 Ill. App. 380. This judgment of the appellate court was reversed by the supreme court. 324 Ill. 479. After remand, there was another trial resulting in a directed verdict and judgment for petitioner; and this judgment the appellate court, following the decision of the supreme court of the state, reversed. 251 Ill. App. 623. Upon the third trial, judgment upon a verdict was entered in favor of the respondent. This the appellate court affirmed, 258 Ill. App. 545, and the supreme court refused certiorari to review the cause.

The appellate court, in holding upon the first appeal that respondent was not engaged in interstate commerce, applied the rule laid down in the *Shanks* case, *supra;* and in so doing was clearly right.

The railroad company which was sued in the *Shanks* case maintained a large machine shop for repairing locomotives used in both interstate and intrastate traffic. While employed in this shop, Shanks was injured through the negligence of the company. Usually he was employed in repair work, but on the occasion of the injury he was engaged solely in taking down, and putting into a new location, an overhead countershaft through which power was communicated to some of the machinery used in the repair work. The Employers' Liability Act provides that "every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," if the injury be due to the negligence of the carrier, etc. This court, at page 558, after quoting the words of the act, laid down the following test for determining whether the employee, in any given case, comes within them:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

It will be observed that the word used in defining the test is "transportation," not the word "commerce." The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it.

Since the decision in the *Shanks* case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated. It is necessary to refer to only a few of the decisions. In *Chi., Burlington & Q. R. R.* v. *Harrington*, *supra*, an employee engaged in placing coal in coal chutes, thence to be supplied to locomotives engaged in interstate traffic, was held not to have met the test. In *Illinois Central R. R. Co.* v. *Cousins*, 241 U. S. 641, as appears from the decision of the state court (126 Minn. 172), an employee was engaged in wheeling a barrow of coal to heat the shop in which other employees were at work repairing cars that had been, and were to be, used in interstate traffic. The state court held that the employee came within the act, on the ground that the work which he was doing was a part of the interstate commerce in which the carrier was engaged, and cited *Pedersen* v. *Del., Lack. & West. R. R. Co.*, 229 U. S. 146. This court, however, repudiated that view, and reversed in an opinion *per curiam* on the authority of the *Shanks* case. In *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 192, it was held, applying the test of the *Shanks* case, that employment in guarding tools, intended for use in the construction of a new depot and tracks to be used in interstate commerce, had no such direct relation to interstate transportation as was contemplated by the Employers' Liability Act.

The rule announced by the *Shanks* case has been categorically restated and applied also in the following cases among others: *So. Pac. Co.* v. *Industrial Accident Comm.*, 251 U. S. 259, 263; *Industrial Commission* v. *Davis*, 259 U. S. 182, 185; *B. & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540, 543. The applicable test thus firmly established is not to be shaken by the one or two decisions of this court where, inadvertently, the word "commerce" has been employed instead of the word "transportation."

Plainly, the respondent in the present case does not bring himself within the rule. At the time of receiving his injury he was engaged in work not incidental to transportation in interstate commerce, but purely incidental to the furnishing of means for heating the station and other structures of the company. His duty ended when he had produced a supply of steam for that purpose. He had nothing to do with its distribution or specific use. Indeed, what he produced was not used or intended to be used, directly or indirectly, in the transportation of anything. It is plain that his work was not in interstate transportation and was not so closely related to such transportation as to cause it to be practically a part of it. Certainly that work was no more closely related to transportation than was that of the employee in the *Harrington* case, who placed coal in the chutes for the use of locomotives engaged in interstate transportation; or that of the employee in the *Cousins* case, who supplied coal for heating the shop in which cars used in interstate traffic were repaired. The work of the employees in those cases and that of the respondent here are, in fact, so nearly alike in their lack of necessary relationship to interstate transportation, as to be in principle the same.

Judgment reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.